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No.

In The

Supreme Court of the United States

October Term, 1994

JILL NESLADEK, as Trustee for the Heirs and Next of Kin of Jeremy J. Nesladek, Decedent,

Petitioner,

vs.

FORD MOTOR COMPANY,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Eighth Circuit violate the *Erie* Doctrine by creating federal common law relative to forum shopping?

2. In diversity cases, when certification is an option, should federal courts be given any discretion to decide dispositive questions of state law?

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OPINIONS BELOW

The March 7, 1994 decision and final judgment of the United States District Court for the District of Minnesota, denying Petitioner's motion to certify questions to the Minnesota Supreme Court and sustaining Respondent's Motion for Summary Judgment is reported. *Nesladek v. Ford Motor Co.*, 876 F. Supp. 1061 (D. Minn. 1994). (App. E). The decision of the United States Court of Appeals for the Eighth Circuit not to certify questions to the Minnesota Supreme Court is unreported. (App. C). The decision of the Eighth Circuit, affirming the trial court is reported. *Nesladek v. Ford Motor Co.*, 46 F.3d 734 (8th Cir. 1995). (App. B).

STATEMENT OF JURISDICTION

This Court's jurisdiction to review the decision of the United States Court of Appeals for the Eighth Circuit, is invoked pursuant to 28 U.S.C. § 1254(1). The Eighth Circuit filed its 2:1 decision on January 26, 1995. (App. B). Petitioner's timely petition for rehearing was denied on March 28, 1995. (App. A).

STATUTES INVOLVED

Minn. Stat. § 480.061 (1992), **Certification to Supreme Court** – reproduced in Appendix F.

Minn. Stat. § 604.03 (1994), Useful Life of Product – reproduced in Appendix G.

Neb. Rev. Stat. § 25-224, (Reissue 1989), Actions on Product Liability – Reproduced in Appendix H.

STATEMENT OF THE CASE

A. Procedural History

This is a wrongful death action initially filed in a Minnesota state court involving a pickup truck which was introduced into the stream of commerce in Minnesota and which failed in Nebraska. Petitioner, the Plaintiff below, is a resident of Minnesota and the trustee appointed by the Minnesota state court to prosecute a claim for the wrongful death of her son, Jeremy. Respondent, the Defendant below, Ford Motor Company, is the manufacturer of the pickup truck which killed Jeremy when the the transmission jumped from park to reverse. This is a known and well-litigated design defect in Ford vehicles manufactured during certain years and the case is founded upon established theories of products liability. *Ford Motor Co. v. Bartholomew*, 297 S.E. 2d 675 (Va. 1982); *Ford Motor Co. v. Nowak*, 638 S.W. 2d 582 (Tex. Ct. App. 1982); *Lenhardt v. Ford Motor Co.*, 683 P.2d 1097 (Wash. 1984), and *Kallio v. Ford Motor Co.*, 391 N.W. 2d 860 (Minn. App. 1986).

Ford removed the case to the District Court for the District of Minnesota pursuant to 28 U.S.C. § 1441(a). Ford then filed a Rule 56 motion arguing that Nebraska's ten year ultimate statute of repose, Neb. Rev. Stat. § 25-224(2), should apply to this cause of action. The laws of Nebraska and Minnesota are in conflict. Nebraska is one of the five states in the Union with an ultimate products liability statute of repose. Minnesota is aligned with the forty-five states which do not have an ultimate products liability statute of repose. The choice of law question presented issues which had not previously been determined by the Minnesota Supreme Court under Minnesota choice of law methodology. Petitioner requested that questions of law be certified to the Minnesota Supreme Court. The District Court declined. The District Court, relying on its understanding of Minnesota choice

of law methodology, applied the law of Nebraska and sustained Ford's Rule 56 Motion.

Petitioner appealed to the United States Court of Appeals for the Eighth Circuit. Petitioner promptly moved the Eighth Circuit for an Order certifying questions to the Minnesota Supreme Court. The Eighth Circuit denied the Motion without explanation or opinion. Upon substantive determination, the 2:1 majority relied on an intermediate state court decision, *Lommen v. City of East Grand Forks,* 522 N.W. 2d 148 (Minn. Ct. App. 1994), which, by way of Minnesota's certiorari process, is being reviewed by the Minnesota Supreme Court, *pet. for rev. granted* (Minn. Dec. 2, 1994). Oral argument before the Minnesota Supreme Court was held on May 8, 1995. Based upon dicta from the intermediate state court of appeals decision in *Lommen,* the Eighth Circuit affirmed the District Court. The dissent argued that the Minnesota Supreme Court had clearly enunciated conflicts of law rules which were contrary to the majority's reading of Minnesota law and that the majority was simply creating a punitive rule rather than an analysis of the choice of law under Minnesota's conflicts methodology.

B. Statement of Facts

On April 18, 1990, near West Point, Nebraska, Petitioner's decedent's father, Ken Nesladek, started the family's Ford pickup truck, preparing to take three-year-old Jeremy and Jeremy's younger brother, Dustin, to day care. With Dustin in the truck, Ken Nesladek realized Jeremy and his toy wagon were behind the truck and left the vehicle to move the wagon and retrieve his son. When he was at the rear of the truck, the truck jumped from park to reverse and backed over Jeremy, severely injuring him. Jeremy died from his injuries about two years later on February 20, 1992, at the family farm in Nebraska.

The product involved was the family's farm pickup truck. The pickup truck was a combination of a 1973 Ford chassis and a 1976 Ford cab. The original 1973 cab was damaged and was replaced with a 1976 cab prior to the failure. The 1973 and 1976 cabs were interchangeable and were regularly and routinely serviced as such by Ford Motor Company. The procedure required no modification or customization of the vehicle. Nothing associated with placing the gear shift selector, steering column and transmission linkage system of the 1976 cab on top of the 1973 chassis played a role in the failure. This is a design defect case.

The upper portion of the automatic transmission gear selection system of the Ford pickup truck was installed at Ford's Saint Paul, Minnesota factory and placed into the stream of commerce in 1975.

After Ford manufactured the transmission, Nebraska enacted an ultimate 10 year statute of repose governing products liability actions. Neb. Rev. Stat. § 25-224(2). Minnesota does not have a borrowing statute which would require application of Nebraska's statute of repose to this case. Minnesota does not have a products liability statute of repose which would operate as a bar to Petitioner's claim.

After the death of their son and brother, the entire Nesladek family moved to Minnesota. Subsequently, Petitioner was appointed trustee by the Minnesota state court and filed suit in the state court as a citizen of Minnesota against Ford, a manufacturer with substantial contacts in Minnesota, not the least of which was the manufacturing facility from which this product was introduced into the stream of commerce.

C. Minnesota's Choice of Law Requirements

Minnesota has adopted a multi-factor choice of law test. Minnesota utilizes as many as five factors when analyzing choice of law questions which arise in contract cases. These five factors are: (1) predictability of results; (2) maintenance of interstate order; (3) simplification of the judicial task; (4) advancement of the forum's governmental interests; and (5) application of the better rule of law. The Minnesota Supreme Court has clearly enunciated a rule which provides that only two factors are relevant in a tort case such as ths one presented by this Petition. Those two factors are the governmental interests and better rule of law.

As Judge Lay said in dissenting, the Eighth Circuit disregarded Minnesota law:

> I think it is obvious that both the district court and the majority have misconstrued the controlling choice-of-law rules under Minnesota law. The majority emphasizes that because the plaintiff is guilty of forum shopping, Nebraska, not Minnesota law should be applied. With all due respect, this line of reasoning makes little sense. The majority's approach offers a sanction or punishment rather than an analysis as to choice of law under Minnesota's conflicts methodology.
>
> More importantly, the Minnesota Supreme Court has been quite clear that in tort situations, only the last two items of Professor Leflar's choice-influencing considerations are relevant. The majority fails to provide a

careful analysis of existing Minnesota law. In *Schwartz v. Consolidated Freightways Corp.*, 221 N.W.2d 665, 668 (Minn. 1974), *cert. denied*, 425 U.S. 959 (1976), and *Bigelow v. Halloran*, 313 N.W.2d 10,12 (Minn. 1981), the Minnesota Supreme Court stated that only the last two items of Professor Leflar's five-point methodologly are relevant to tort cases.

* * *

[The Minnesota Supreme Court] clearly discounted the relevance of forum shopping in Minnesota's choice-of-law analysis. The court stated:

> Defendants argue that plaintiff was forum shopping. Suffice it to say that the courts of this state are open to those residents and nonresidents alike who properly invoke. within constitutional limitations, the jurisdiction of these courts. In the case at bar, plaintiff is a Minnesota resident who is currently suffering from extensive and severe injuries. It would be at least plausible to presume that Minnesota courts would be plaintiff's logical choice. Further, it is noteworthy that plaintiff did not first bring his action in another state and then later bring suit in this state.

221 N.W.2d at 669. Furthermore, to support its use of forum shopping, the majority quotes *Lommen v. City of East Grand Forks*, 522

> N.W.2d 148, 151 (Minn. Ct. App. 1994), out of context.

(App. B, 16a-18a).

REASONS FOR GRANTING THE WRIT

I.

THE EIGHTH CIRCUIT'S FAILURE TO FOLLOW THE REQUIREMENTS OF THE *ERIE* DOCTRINE IN THIS CASE HAS CREATED A CONFLICT BETWEEN THE CIRCUITS.

A. The decision below creates federal common law in direct conflict with the *Erie* doctrine and Minnesota's choice of law methodology.

In a diversity case such as this, a federal court must determine what the state law is and apply it, rather than prescribe a different rule, no matter how superior the federal court's view may appear to be. *West v. American Telephone & Telegraph Co.*, 311 U.S. 223, 237 (1940). Decisions of the highest court of the state are binding, unless that court "has given clear and persuasive indication that its pronouncement will be modified, limited or restricted." *West*, 311 U.S. at 237.

These principles are mandated by *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

> [T]he rules applicable to conflict of laws are not "a transcendental body of law outside of any particular state but obligatory within it". If the federal court in Massachusetts on points of conflict of laws may disregard the law of Massachusetts as formulated by the Supreme

> Judicial Court and take its own view as a matter of "general law", then the ghost of *Swift v. Tyson* ... still walks abroad, somewhat shrunken in size, yet capable of much mischief.

Sampson v. Channell, 110 F.2d 754, 671 (1st Cir. 1940) (quoting *Erie,* 304 U.S. at 79), *cert. denied,* 310 U.S. 650 (1940).

The case at bar is a choice of law case. A federal court sitting in diversity is bound to apply the choice of law principles of the forum state in the case before it: *Klaxon Co. v. Stentor Elec. Mfg. Co.,* 313 U.S. 487 (1941). Accordingly, the District Court and the Eighth Circuit were bound to apply Minnesota's choice of law principles.

The Minnesota Supreme Court has adopted Professor Leflar's five choice influencing considerations.[1] *Milkovich v. Saari,* 203 N.W. 2d 408 (Minn. 1973). Those choice-influencing considerations are: (1) predictability of results; (2) maintenance of interstate order; (3) simplification of the judicial task; (4) advancement of the forum's governmental interests; and (5) application of the better rule of law.

In *Schwartz v. Consolidated Freightways Corp.,* 221 N.W.2d 665, 668 (Minn. 1974), *cert. denied,* 425 U.S. 959 (1976), and *Bigelow v. Halloran,* 313 N.W.2d 10, 12 (Minn. 1981), the Minnesota Supreme Court clearly and persuasively stated that only the last two items of Professor Leflar's five-point

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1. Leflar, *Choice–Influencing Considerations in Conflicts Law,* 41 N.Y.U. Rev. 267; Leflar, *Conflicts Law: More on Choice Influencing Considerations,* 54 Calif. L. Rev. 1584; and Ehrenzweig, *"False Conflicts" and the "Better Rule": Threat and Promise in Multistate Tort Law,* 53 Va. L. Rev. 847. Ehrenzweig's article was extensively quoted by the Minnesota Supreme Court in explaining the importance of the better rule of law consideration.

methodology are relevant to tort cases. These two considerations are " 1) advancement of the forum's governmental interests; and 2) application of the better rule of law." *Bigelow,* 313 N.W.2d at 12; *Schwartz,* 221 N.W.2d at 668.

Despite the clear pronouncement from the Minnesota Supreme Court, the two judge majority of the Eighth Circuit panel ignored the Minnesota Supreme Court and held that all five factors may be applied to Petitioner's case. The lower court relied upon a state intermediate court of appeals decision involving a governmental immunity police pursuit case. *Lommen v. City of East Grand Forks,* 522 N.W.2d 148, 150-53 (Minn. Ct. App. 1994), *pet. for rev. granted* (Minn. Dec. 2, 1994). *Lommen* was a 2:1 decision of Minnesota's intermediate court. Since the Minnesota Supreme Court has granted review,[2] it is subject to modification or reversal. *Lommen* conflicts with the rule set forth in *Bigelow* and *Schwartz,* and the Minnesota Supreme Court has not indicated it will modify that rule (certainly, granting of the Petition to review raises a contrary conclusion). The Eighth Circuit could not properly follow *Lommen* and ignore the mandates of *Bigelow* and *Schwartz.*[3]

Then, in applying all five factors, the Eighth Circuit erroneously gave decisive weight to Nesladek's alleged forum

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2. Oral argument was held on May 8, 1995 and the case is under advisement.

3. The lower court's heavy reliance upon an intermediate Minnesota court was unwarranted. The Minnesota Court of Appeals is an error-correcting court. *Matter of Welfare of M.D.O.,* 462 N.W. 2d 370 (Minn. 1990). While federal courts may consider intermediate state court decisions in attempting to predict how the highest state court would decide an issue, federal courts should not rely upon those intermediate rulings, when persuasive data indicates that the highest state court would decide otherwise. *Commissioner v. Estate of Bosch,* 387 U.S. 456, 465 (1967).

shopping, considering it under both the second factor (maintenance of interstate order), which should not have been considered, and the fourth (advancing Minnesota's interest). However, as Judge Lay's dissent points out, the Minnesota Supreme Court has discounted the relevance of forum shopping in Minnesota's choice of law analysis. In *Schwartz,* the Minnesota Supreme Court stated:

> Defendants argue that plaintiff was forum shopping. Suffice it to say that the courts of this state are open to those residents and nonresidents alike who properly invoke, within constitutional limitations, the jurisdiction of these courts. In the case at bar, plaintiff is a Minnesota resident who is currently suffering from extensive and severe injuries. It would be at least plausible to presume that Minnesota courts would be plaintiff's logical choice. Further, it is noteworthy *that plaintiff did not first bring his action in another state and then later bring suit in this state.*

221 N.W. 2d at 669 (emphasis added). Here, too, Nesladek did not first bring suit in another state. This is the only action commenced by Petitioner.

On three separate occasions, the Minnesota Supreme Court examined Plaintiffs' post-occurrence and pre-litigation moves to Minnesota. On all three occasions, the Minnesota Supreme Court applied Minnesota choice of law so as to allow recovery. (*Bigelow, supra*; *Savchuk v. Rush,* 245 N.W. 2d 624 (Minn. 1976), and 276 N.W. 2d 888 (Minn. 1978), *remanded and then reversed,* 433 U.S. 902 (1977), 444 U.S. 320 (1980); and *Hague v. Allstate Ins. Co.,* 289 N.W. 2d 43 (Minn. 1979), *aff'd,* 449 U.S. 302 (1981).

Hague is an important Minnesota decision and involves facts which are akin to the case at bar. In *Hague*, the Plaintiff and Plaintiff's decedent were both lifetime residents of Wisconsin. Her wrongful death action was based on a two vehicle accident which occurred in Wisconsin and involved two Wisconsin residents. The insurance contract was written in Wisconsin. Almost two years after the accident, Mrs. Hague moved to Minnesota, was appointed personal representative by a Minnesota court and married a Minnesota resident "almost concurrently with the initiation of [her lawsuit]." *Hague*, 289 N.W. 2d at 45. The Minnesota court applied all five choice-influencing considerations to this contract case and applied the law of Minnesota which allowed stacking of the three uninsured policies rather than the law of Wisconsin which prohibited such stacking. This Court affirmed. The Eighth Circuit ignored the Minnesota Supreme Court. The Eighth Circuit created its own definition of forum shopping and punished Petitioner for the forum selection. Decades ago, this Court determined that the federal judiciary, sitting in diversity, must follow state law.

Minnesota courts define "forum shopping" as involving a plaintiff who brings suit in Minnesota after having sued elsewhere. *See Jepson v. General Cas. Co. of Wisconsin*, 513 N.W. 2d 467, 471 (Minn. 1994) (stating that plaintiff was forum shopping because he had brought suit in North Dakota before suing in Minnesota) and *Schwartz*, 221 N.W.2d at 669 ("it is noteworthy that plaintiff did not first bring his action in another state and then later bring suit in this state").

The Minnesota Supreme Court would abhor a result that bars a plaintiff from seeking redress for injuries caused by an allegedly defective product, where other plaintiffs consistently receive compensation for injuries caused by this pervasive, continuing product defect. The Minnesota Supreme Court has repeatedly considered a measured response to be the better law

rather than an arbitrary bar to recovery by a tort victim. *See Bigelow,* 313 N.W.2d at 12 (holding survival statute not "better law" because it would arbitrarily bar compensation to tort victim); *Schwartz,* 221 N.W.2d at 669 (holding comparative fault statute "better law" than contributory negligence rule which would completely bar plaintiff's claims even though defendant was negligent); *Milkovich,* 203 N.W. 2d at 412 (holding common law negligence rules are better than arbitrary bar of guest statute).

Minnesota courts would favor application of the rule of law which is the majority view. *Hague,* 289 N.W.2d at 49. An absolute arbitrary bar is distinctly a minority view, followed by only five states. (App. I). Minnesota's approach was adopted in the Model Uniform Products Liability Act in the late 1970's, and is the majority rule. The Minnesota Supreme Court would not determine that Nebraska's minority rule, which arbitrarily bars injured tort victims from seeking redress for injuries caused by allegedly defective products, is the better rule of law. The Minnesota Supreme Court would find that this factor favors application of Minnesota law. The Eighth Circuit did not apply the significant better law consideration as the Minnesota Supreme Court would have applied it. Instead, the court below substituted its own view as to which law was better for the case at bar and, in so doing, violated the *Erie* doctrine.

Petitioner presents the type of products liability claim which is regularly and routinely removed to federal courts by manufacturing defendants. This case comes to the Court with uncomplicated facts. The case was disposed of by way of a motion for summary judgment and affords the Court with an opportunity to reiterate that federal courts may not depart from the accepted and usual course of judicial proceedings by ignoring the *Erie* doctrine and substituting their own view on forum shopping.

B. The decision below is in conflict with the decisions of other Courts of Appeals.

Plaintiffs regularly and routinely seek out forums which will apply the law of the jurisdiction where a defective product was assembled and/or placed into the stream of commerce and/or where the plaintiff is domiciled. Circuits other than the Eighth Circuit regularly and routinely have allowed this practice.

Indeed, this Court also has recognized and approved of this common litigation strategy.

For example, in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779 (1983), this Court observed that: "Petitioner's successful search for a State with a lengthy statute of limitations is no different from the litigation strategy of countless plaintiffs who seek a forum with favorable substantive or procedural rules or sympathetic local populations." *Ferens v. John Deere Co.*, 494 U.S. 516 (1990) was a products liability action involving a choice of law question. The Court was presented with an opportunity to establish a punitive rule, denying access to courts for forum shopping. The Court specifically declined to do so.

The First Circuit tolerated forum shopping by concluding that Rhode Island, the plaintiff's domicile, had a stronger governmental interest in the suit than Massachusetts, the state where the automobile accident occurred, because Rhode Island has a strong interest in compensating its residents for torts resulting in severe injuries or deaths. *Turcotte v. Ford Motor Co.*, 494 F.2d 173, 177-78 (1st Cir. 1974).

The Third Circuit tolerated forum shopping by choosing to apply Pennsylvania law because that state has the greatest interest in governing the manufacturer of products within its borders, although the helicopter crash at issue happened

elsewhere. *In re Air Crash Disaster,* 769 F.2d 115, 120 n.7 (3d Cir. 1985), *cert. denied,* 474 U.S. 1082 (1986).

The Fifth Circuit tolerated forum shopping by holding Texas' substantive law should apply rather than the law of the state where the accident occurred, because Texas has a particularly strong interest "when the defective product in question was manufactured and placed in the stream of commerce" in Texas. *Mitchell v. Lone Star Ammunition, Inc.,* 913 F.2d 242, 250 (5th Cir. 1990).

The Sixth Circuit tolerated forum shopping by holding that the Florida statute of repose almost identical to the Nebraska statute of repose in the case at bar, would not apply to the tort despite the fact that the product failed in Florida. The court held that Michigan, the state of manufacture and forum state, would be the source of law with respect to the products liability. *Mahne v. Ford Motor Co.,* 900 F.2d 83 (6th Cir. 1990).

The Seventh Circuit tolerated forum shopping by holding that despite the fact that the injury occurred as a result of using a thirty-one year old combine in Tennessee, a state with a ten year ultimate statute of repose almost identical to the Nebraska statute of repose in question, that the law of Wisconsin, the forum state and place of design, would apply to the court action. *Beard v. J.I. Case Co.,* 823 F.2d 1095 (7th Cir. 1987).

Petitioner presents the type of tort case which is regularly and routinely litigated in federal courts pursuant to diversity jurisdiction. Such products liability cases typically involve choice of law questions and present parties and courts with forum selection options. This petition affords the Court with an opportunity to address and resolve the conflict which exists between the circuits relative to the propriety of utilizing a litigation strategy to seek a forum with favorable substantive or procedural rules or sympathetic local populations.

II.

AT LEAST IN SOME CIRCUMSTANCES, THERE SHOULD BE NO DISCRETION FOR A FEDERAL COURT SITTING IN DIVERSITY TO DENY A REQUEST FOR CERTIFICATION OF DISPOSITIVE QUESTIONS OF STATE LAW THAT ARE UNSETTLED OR UNCLEAR.

A. Background

The Minnesota choice of law question in this diversity case was outcome dispositive. Petitioner requested that the District Court and the Eighth Circuit certify questions to the Minnesota Supreme Court. Both lower courts refused to do so.

The certification procedure "does, of course, in the long run save time, energy and resources and helps build a cooperative judicial federalism." *Lehman Brothers v. Schein,* 416 U.S. 386, 391 (1974).

Public policy matters are better left to the state supreme court.

> Federal courts of appeals perform a different role when they decide questions of state law than they do when they decide questions of federal law. In the former case, these courts are not sources of laws but only reflections of the jurisprudence of the courts of a state. While in deciding novel federal questions, court of appeals are likely to ponder the policy implications as well as the decisional law, only the latter need be considered in deciding questions of state law.

Salve Regina College v. Russell, 499 U.S. 225 (1991) (Rehnquist, C. J., dissenting).

At several points in the choice of law analysis, the Eighth Circuit was required to resolve determinative issues for which controlling precedent was lacking in Minnesota jurisprudence. No Minnesota court had addressed a time limitation similar to Neb. Rev. Stat. § 25-224(2). No controlling precedent existed to guide the lower court.

Petitioner moved the District Court and the Eighth Circuit for an order certifying the following questions to the Minnesota Supreme Court:

> 1. Does Minnesota have any governmental interest to be advanced by applying Nebraska's statute of repose so as to bar a cause of action brought by a Minnesota resident and citizen?
>
> 2. Is an ultimate statute of repose such as Neb. Rev. Stat. § 25-244(2) a better law than Minnesota's absence of a products liability statute of repose?
>
> 3. Do the facts presented establish that appellant is a forum shopper under Minnesota choice of law rules and, if so, what ramifications arise from that characterization? and
>
> 4. If the answer to the foregoing questions results in a tentative choice of Nebraska law, does application of Nebraska law to a cause of action owned by a Minnesota citizen violate the remedy clause of the Minnesota Bill of Rights (Minn. Const. Art. 1, § 8)?

A factor involved in Minnesota choice of law methodology is whether Minnesota's interests are advanced by the application

of Nebraska's ten year time limit. This consideration embodies Minnesota's concern that it not be called upon to enforce rules inconsistent with its concepts of fairness and justice or administer laws that run afoul of Minnesota socio-legal policies. *Milkovich*, 203 N.W.2d at 414; *Hime v. State Farm Fire & Cas. Co.*, 284 N.W.2d 829, 833 (Minn. 1979). The lower court was unguided in its measurement of the Nebraska statute against these Minnesota public policy standards.

The lower court was equally unguided by any Minnesota opinion deciding which of the conflicting laws is the better rule of law. Such a qualitative, value-laden evaluation is based wholly on the policy considerations reflected in Minnesota court opinions. Because those courts have never passed upon a time limitation similar to Neb. Rev. Stat. § 25-224(2), no reflection exists. The district court specifically ruled that it "need not reach this consideration" (App. E, 59a) and the Eighth Circuit ruled that "we need not decide which state has the better law." (App. B, 15a). Given the alternative of certification, no speculation was required. Certification of these public policy questions would have avoided the inequitable administration of justice that may arise if a Minnesota court is later faced with a similar statute and reaches the opposite conclusion of the Eighth Circuit[4] or, for that matter, if the Minnesota Supreme Court reverses *Lommen* in the next few months.

The lower court also engaged in speculation and conjecture

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4. When faced with a statute of repose from the state of North Carolina, the Sixth Circuit ruled that a product liability action could be maintained in Michigan despite the North Carolina law. *Mahne v. Ford Motor Co.*, 900 F.2d 83 (6th Cir. 1990). Three years later, a Michigan Court of Appeals ruled that Michigan choice of law rules required the application of a Florida statute of repose. *Farrell v. Ford Motor Co.*, 501 N.W.2d 567 (Mich. Ct. App. 1993). This inequitable administration of justice could have been avoided if a Michigan state court had been given the first opportunity to pass on this important issue of state law.

relative to Minnesota's approach to forum shopping in a products liability case. According to Ford and the court below, this case presents elements of forum selection. The Minnesota legislature has repealed its borrowing statute and declared that the courts of Minnesota are open to all individuals who obtain jurisdiction over a defendant if application of Minnesota law would not deprive a defendant of its due process rights. Both this Court[5] and Minnesota Supreme Court[6] have made statements acknowledging that forum selection is an acceptable tool which is available to litigants. The Minnesota Supreme Court has never been called upon to establish public policy by defining the term *forum shopping* in the context of a products liability case. Since Minnesota has not defined that term, the Eighth Circuit divined not only a definition, but the sanctions which flow therefrom.

The Minnesota Supreme Court has not established whether forum shoppers are to be applauded and commended for utilizing Minnesota courts to obtain justice or accused and condemned for attempting to avoid an unjust result in another state. Due process requires that Petitioner be given an advance definition of "forum shopping" before being labeled and punished as a forum shopper. The Minnesota Supreme Court has provided no such definition and the Eighth Circuit abused its discretion by not certifying the proposed questions to the Minnesota Supreme Court. This case presents an excellent opportunity to clarify the discretionary standard of *Lehman*.

B. Considerations of comity require that federal courts sitting in diversity avail themselves of state law certification processes in cases such as this one.

Ford Motor Company is an experienced litigator of this particular product and of the statute of repose at issue. An

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5. *Keeton v. Hustler Magazine, Inc., supra.*

6. *Schwartz v. Consolidated Freightways Corp. of Delaware, supra.*

analysis of the following two decisions is illustrative of that experience and the bizarre result obtained by the Sixth Circuit's failure to consider comity:

1. *Mahne v. Ford Motor Co.*, 900 F.2d 83 (6th Cir. 1990), is a Michigan choice of law case involving a defective Ford vehicle and an ultimate products liability statute of repose. Plaintiff was a Florida resident. The product failed in Florida. Florida had a products liability statute of repose which has now been repealed. The statute formerly on the books barred recovery. The court examined Michigan's interest-analysis approach to choice of laws and found that Michigan's laws should be applied to the action. Despite Florida's products liability statute of repose, Plaintiff was not denied her day in Court.

2. *Farrell v. Ford Motor Co.*, 501 N.W. 2d 567 (Mich. Ct. App. 1993) (leave to appeal denied by Michigan Supreme Court on April 26, 1994) involved a set of facts almost identical to *Mahne*. Farrell's older model Ford LTD jumped out of park and into reverse, ran over and killed Mrs. Farrell. North Carolina's product liability laws contained an ultimate statute of repose. Mr. Farrell filed a lawsuit in Michigan. The Michigan Court examined Michigan's interest-analysis approach to choice of laws and found that North Carolina's laws applied. Plaintiff was denied his day in court.

Absent contorted mental gymnastics, *Mahne* and *Farrell* are irreconcilable. In the interest of comity, and in order to avoid a similar irreconcilable difference between the Minnesota Supreme Court and the Eighth Circuit, the choice of law question should have been certified to the Minnesota Supreme Court.

The Seventh Circuit was presented with a factual pattern similar to the one at bar in *Beard v. J. I. Case Co.*, 823 F.2d 1095 (7th Cir. 1987). Frank Beard, just like Jeremy's father, was a

farmer. Beard also lived in one of the five states of this Union with an ultimate statute of repose. Beard was injured when he became entangled in a cornpicker. Beard alleged that the 31-year-old cornpicker was defectively designed. However, the Tennessee Products Liability Act barred any products liability action not brought within ten (10) years of manufacture. Beard filed a products liability action in federal district court in Wisconsin. Ford would characterize this intelligent choice of a forum as "forum shopping" and would have Beard locked out of the courtroom without any further ado. The injury took place in Tennessee. Plaintiff was a lifetime resident of Tennessee and had no connection to Wisconsin. Beard alleged that the defective design work occurred in Wisconsin[7] and that the action was, therefore, governed by Wisconsin law. The Seventh Circuit ruled that the law of the forum state governs whether a foreign state's period of limitation *or repose* should be considered an integral part of the substantive right. The Seventh Circuit held that labeling Tennessee's period of repose as "substantive" was too simplistic and incomplete and allowed Beard to have his day in court.

In light of Minnesota's repeal of its borrowing statute, it is not only likely, but very probable, that factual patterns similar to those presented by *Beard, Farrell, Mahne* and *Nesladek* will be presented to the Minnesota Supreme Court in the future.

This case presents an opportunity for the Court to delineate clear guidelines relative to the certification process in order to foster comity.

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7. In the case at bar, the very essence of the negligence complained of took place in Minnesota. The product was assembled and introduced into the stream of commerce in Minnesota.

(1) Federal courts should be required to utilize the certification process when presented with dispositive clear questions of law and public policy which are of particular interest to the state courts.

The case at bar involves a choice of law between Nebraska's prohibitive statute of limitation and Minnesota's less restrictive statute of limitation. The choice of law involves $738,000 in medical expenses. Because of Farm Bureau Life Insurance Company's subrogation claim, this case has economically affected 35,000 Farm Bureau members who are Minnesota citizens. The public policy declarations of the Minnesota legislature by the repeal of its borrowing statute and public policy declarations of the Minnesota Supreme Court should have been applied to the facts presented in this case by the Minnesota Supreme Court, not a federal court left to speculate as to the possible application.

Minnesota choice of law rules involve choice influencing considerations which intimately involve Minnesota public policy. The questions of which conflicting law is the better rule of law given the present social/economic climate of Minnesota and whether Nebraska law advances Minnesota's governmental interests are questions of law and public policy of particular interest to the courts of Minnesota.

The Minnesota Supreme Court has never passed upon whether application of a foreign state's statute of repose to a cause of action owned by a citizen of Minnesota would violate the remedy clause of the Minnesota constitution. (Minn. Const. Art. 1, § 8). An almost identical provision in the Wisconsin Constitution is precisely why the Seventh Circuit found in favor of Plaintiff and applied the law of Wisconsin to the Tennessee tort in *Beard, supra.* However, the Wisconsin Supreme Court had already spoken. Therefore, the Seventh Circuit was guided by Wisconsin precedent and was not forced to speculate.

In the case at bar, application of Nebraska law to this cause of action has left Petitioner with absolutely no remedy for the wrongs received. Application of Nebraska law to this Minnesota lawsuit has resulted in a complete denial of Petitioner's right to justice. The state constitutional question should have been referred to the Minnesota Supreme Court.

(2) Requiring certification to state supreme courts eliminates the possibility that the state courts will subsequently criticize the federal courts for incorrect interpretations of state law.

The underlying purpose of the *Erie* doctrine is to create comity between federal and state courts. This assures that litigants will be treated uniformly whether an issue is decided in a federal courtroom or a state courtroom. A defendant ought not to obtain a substantive advantage by availing itself of 28 U.S.C. § 1441 (a).

In the case at bar, the Eighth Circuit refused to certify questions to the Minnesota Supreme Court. Instead, it ignored two beacon Minnesota Supreme Court cases[8] and relied upon a Minnesota intermediate appellate decision (2 - 1 split). *Lommen,* 522 N.W. 2d (Minn. Ct. App. 1994), *pet. for rev. granted* (Minn. Dec. 2, 1994).

Such refusal to turn to state courts for advice is precisely why

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8. In both *Schwartz v. Consolidated Freightways Corp.*, 221 N.W. 2d 665, 668 (Minn. 1974), *cert. denied,* 425 U.S. 959 (1976), and *Bigelow v. Halloran*, 313 N.W. 2d 10, 12 (Minn. 1981), the Minnesota Supreme Court clearly and unequivocally stated that only the last two items of Professor Leflar's five factors are relevant in tort cases. These two considerations are "1) advancement of the forum's governmental interests; and 2) application of the better rule of law." *Bigelow*, 313 N. W. 2d at 12; *Schwartz*, 221 N.W. 2d at 668.

at least three state supreme courts have refuted circuit court decisions in subsequent state court opinions.

In *Food Fair Stores, Inc. v. Trusell,* 131 So. 2d 730 (Fla. 1961), the Supreme Court of Florida specifically criticized the Fifth Circuit by stating that "the federal court laid aside and declined to follow the rule of this court regarding inferences based on circumstantial evidence which we announced in [a prior case] and which we have consistently followed since." at 733-34.

In *Truck Ins. Exch. v. Seelbach,* 339 S.W. 2d 521 (Tex. 1960), the Texas Supreme Court refuted the Fifth Circuit and said:

> We are impressed by the cogent reasoning for the result reached. It does appear inequitable to penalize in effect the insurance carrier for not making the tender of an operation when the need was not apparent and a tender would have been futile. But we must reject the theory that this lack of information creates an exception and largely so for the reasons we have given in sustaining the general rule of [the two decisions cited by the Fifth Circuit].

Id. at 525.

In 1978 the Second Circuit engaged in conjecture relative to the status New York tort law and speculated as follows:

> Our reading of past cases and our assessment of current legal thinking lead us to the judgment that the New York Court of Appeals would recognize an action for violation of the right to be free from unreasonable intrusion.

Birnbaum v. United States, 588 F.2d 319, 326 (2nd Cir. 1978). Four years later, the highest court of New York rebutted the Second Circuit's speculation by explaining that in New York, "there exists no so called common-law right to privacy." *Arrington v. New York Times Co.*, 434 N.E. 2d 1319, 1321 (N.Y. 1982).

The Eighth Circuit had absolutely no reason to refrain from certification in order to obtain and apply the correct Minnesota law. The Minnesota legislature created a mechanism whereby the Eighth Circuit could have, and indeed should have, certified questions directly to the Minnesota Supreme Court. Minn. Stat. § 480.061 (1992). Furthermore, the Minnesota Supreme Court has welcomed the opportunity to foster *Erie* comity and has held that its answers to the federal courts are "a pronouncement of law with the same effect as our pronouncements of law in cases arising in the courts of this state." *Wolner v. Mahaska Industries, Inc.*, 325 N.W.2d 39, 41 (Minn. 1982).

As this Court has observed: "[a]lthough we do not mean to intimate that abstention would be improper in this case were certification not possible, the availability of certification greatly simplifies the analysis." *Bellotti v. Baird*, 428 U.S. 132, 151 (1976). Certification is "a mode of disposing of cases in the least cumbersome and most expeditious way." *Chicago, B. & Q. Railroad v. Williams*, 214 U.S. 429, 495-96 (1909) (Holmes, J., dissenting).

Lehman Bros. v. Schein, 416 U.S. 386 (1974), is instructive and illustrative. The Second Circuit, by a divided vote, held that Florida "would probably" follow the majority of states and would allow the shareholders derivative suits to proceed. Recognizing the importance of comity and *Erie*, this Court sought out the correct Florida view directly from the Florida Supreme Court by vacating the Second Circuit's judgment and remanding the case

with the suggestion that certification to the Florida Supreme Court would eliminate the federal court's conjecture. Certification worked and the correct law was applied. The Second Circuit guessed wrong and the court of appeals reversed itself after obtaining the Florida Supreme Court's answer. *Schein v. Chasen*, 519 F.2d 453 (2nd Cir. 1975).

A full seven weeks before the Eighth Circuit's ruling, the Minnesota Supreme Court granted a petition for writ of certiorari to review the Minnesota intermediate decision relied on by the 2-judge majority panel. In light of this action by the Minnesota Supreme Court, the Eighth Circuit should have certified questions rather than engaged in speculation and conjecture, thus exposing the federal court to criticism and, more importantly, subjecting Petitioner to the wrong result. The Eighth Circuit abused the "sound discretion" standard enunciated by this court in *Lehman*.

(3) This Court should establish guidelines regarding the circumstances in which federal courts sitting in diversity must avail themselves of readily available procedures for resolving unclear questions of state law.

Even though this Court has encouraged certification, the lack of guidelines has resulted in a state of affairs where cases are certified to state courts on a haphazard basis.[9] As in this case, the

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9. Professors Corr and Robbins concluded that "[a] large majority of federal judges found the process to be a convenient and appropriate method for ascertaining controlling state law." *Interjurisdictional Certification and Choice of Law*, 41 Vand. L. Rev. 411, 457 (1988). However, that survey of the philosophical beliefs of the federal judiciary did not conform with the empirical data recently tabulated as a part of the American Judicature Society's project entitled "Facilitating the Certification of Questions of Law." Specifically, that report found that "[t]he data, based on a WESTLAW search

(Cont'd)

district court and court of appeals both refused to certify a question raising significant issues of state public policy which should, properly, have been resolved by a state's highest court *not* a federal court. Indeed, in attempting to rationalize its refusal to certify the proposed questions in this case, the district court noted that "the Minnesota Supreme Court has not expressly characterized a products liability statute of repose" (App. E, 48a) and completely ignored the fact that the Minnesota Supreme Court had never been called upon to delineate what, if any, role forum selection plays in a Minnesota products liability/choice of law case. Thus, the *Lehman* "sound discretion" standard appears insufficient and this case presents the Court with an opportunity to articulate clear standards.

Although this Court has encouraged the use of certification, it has not delineated any standards as to when federal courts

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(Cont'd)
of all cases published since 1990, indicate that the 11th Circuit has by far certified the most questions (47) of any federal Circuit, with the 9th Circuit certifying the next largest number of questions (23). The Federal Circuit certified the least number of questions (1). The mean of questions certified by all Circuit courts since 1990 is 14.5. The 11th Circuit also certifies questions, or grants certification applications, at a rate (90%) that is higher than any other circuit. In contrast, the 10th Circuit's rate of certification (34%) is the lowest of all circuits," at p. 12, Jona Goldschmidt, *Results of a National Survey of Federal Judges and State Supreme Court Justices Regarding Certification of Questions of Law 5-12* (Am. Judicature Soc'y Nov. 1994) (unpublished interim report). A complete copy is reproduced as Appendix J.

Perhaps even more illustrative of the need for this Court to provide guidelines is the fact that the survey revealed that a full 30% of circuit judges have failed to hear this Court's "encouragement" and responded that they were either "somewhat" or "very reluctant" to certify while 54% stated that they were "willing" or "very willing" to certify. Equally as telling, a full 39% of district judges were "very" or "somewhat" reluctant to certify. Goldschmidt at 12.

should utilize the certification process.[10] Accordingly, federal courts, such as the ones below, have occasionally reverted to pre-*Erie* policies and practices. The federal common law applied to this case denied Petitioner her day in court. That is not the result which would have occurred had this case been left in the Minnesota state courthouse located a few blocks from the federal courthouse. The ghost of *Swift v. Tyson* is alive and haunting cases which are removed from state court by way of 28 U.S.C. § 1441 motions.

Obtaining the correct result in a diversity case is no less important than obtaining the correct result in a freedom of speech case. Petitioner simply asks that Justice Powell's language in *City of Houston, Texas v. Hill,* 482 U.S. 451 (1987), be applied to her case:

> As Justice O'CONNOR explained recently, "[s]peculation by a federal court about the meaning of a state statute in the absence of prior state court adjudication is particularly gratuitous when . . . the state courts stand willing to address questions of state law on certification from a federal court." *Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 510, 105 S.Ct. 2794, 2805, 86 L.Ed.2d 394 (1985) (concurring). The Court repeatedly has emphasized the appropriateness of certification in cases presenting uncertain questions of state law. In such cases, certification can "'save time, energy, and resources and hel[p] build a cooperative

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10. Indeed, "[o]f the 13 federal Courts of Appeal, only four have rules of procedure governing the certification of questions of law . . . Courts of appeal for the 2nd, 4th, 7th and 10th Circuits." Goldschmidt at p. 4.

> judicial federalism' " *Bellotti v. Baird,* 428 U.S. 132,150-51, 96 S.Ct. 2857, 2867-2868, 49 L.Ed.2d 844 (1976) (quoting *Lehman Brothers v. Schein,* 416 U.S. 386, 391, 94 S.Ct. 1741, 1744, 40 L.Ed.2d 215 (1974)).

City of Houston at 475.

CONCLUSION

The Eighth Circuit, in this case, rendered a decision which is in direct conflict with decisions from the First, Third, Fifth, Sixth and Seventh Circuits regarding the choice of law methodology typically applied to products liability cases brought in federal court on the basis of diversity jurisdiction. The decision below presents the Court with a clear opportunity to provide guidance to the lower federal courts as to when, in the interest of federal/state comity, they must avail themselves of the certification process. For these reasons, Petitioner respectfully requests that the Court grant this petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A — EIGHTH CIRCUIT ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC DATED MARCH 28, 1995

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 94-1885MND

Jill Nesladek, as Trustee for the Heirs and Next of Kin of Jeremy J. Nesladek, Decedent,

Appellant,

v.

Ford Motor Company,

Appellee.

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. Judge McMillian would grant the suggestion for rehearing en banc. The petition for rehearing by the panel is also denied.

March 28, 1995

Order Entered at the Direction of the Court:

s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED JANUARY 26, 1995

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 94-1885

Jill Nesladek, as Trustee for Heirs and Next of Kin of Jeremy J. Nesladek, Decedent,

Appellant,

v.

Ford Motor Company,

Appellee.

Appeal from the United States District Court for the District of Minnesota.

Submitted: October 12, 1994

Filed: January 26, 1995

Before BOWMAN, Circuit Judge, LAY, Senior Circuit Judge, and MORRIS SHEPPARD ARNOLD, Circuit Judge,

BOWMAN, Circuit Judge.

Jill Nesladek, as trustee for the heirs and next of kin of her

son Jeremy, appeals the decision of the District Court[1] granting Ford Motor Company's motion for summary judgment and dismissing her complaint with prejudice. We affirm.

I.

On April 18, 1990, near West Point, Nebraska, Jeremy's father Ken Nesladek started the family's Ford pickup truck, preparing to take three-year-old Jeremy and Jeremy's younger brother Dustin to day care. With Dustin in the truck, Ken Nesladek realized Jeremy and his toy wagon were behind the truck and left the vehicle to move the wagon and retrieve his son. As he proceeded to do so, the truck moved backward and rolled over Jeremy, severely injuring him. Jeremy died from his injuries about two years later on February 20, 1992, at the family farm in Nebraska.

After Jeremy's death, the Nesladeks moved to Minnesota. Jill Nesladek brought this wrongful death suit in Minnesota state court. Ford removed the case to federal court and moved for summary judgment, arguing that Nesladek's claim was barred by Nesbraska's ten-year statute of repose applicable to products liability actions. The District Court granted Ford's motion and Nesladek apeals. We review *de novo* the decision to enter summary judgment.

II.

All agree that this a conflict of laws case. Under Nesbraska law, which the District court applied in dismissing the claim, "any

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1. The Honorable Richard H. Kyle, United States District Judge for the District of Minnesota.

product liability action," with some exceptions not relevant here, "shall be commenced within ten years after the date when the product which allegedly caused the personal injury, death, or damage was first sold or leased for use or cosumption." Neb. Rev. Stat. § 25-224(2) (1989). The truck at issue was a composite of two vehicles, combined in 1989 by Ken Nesladek and Harvey Kreikemeirer: a 1976 Ford model F-250 cab on a 1973 Ford model F-350 chassis. Thus, under Nebraska law, Nesladek cannot maintain this action, as it was precluded by the statute of repose in 1986 (ten years after the 1976 model was first sold) at the latest. Because ten years elapsed before the accident occurred, a cause of action never accrued.

Minnesota's approach to the issue of liability for injury, death, or damage allegedly caused by aged products is its "useful life" statute. Under that statute, "it is a defense to a [products liability] claim against a designer, manufacturer, distributor or seller of the product or a part thereof, that the injury was sustained following the expiration of the ordinary useful life of the product." Minn. Stat. § 604.03 subd. 1 (1992). "The useful life of a product . . . is the period during which with reasonable safety the product should be useful to the user." *Id.* § 604.03 subd. 2. The fact-finder considers, *inter alia,* wear and tear, subsequent industry developments, conditions of use, the manufacturer's stated useful life, and user modification of the product. *Id.* Minnesota's useful life statute would not necessarily be dispositive of Nesladek's claim; rather, it would be for the jury to decide whether the truck's useful life had expired before the accident in question occurred. *See Hodder v. Goodyear Tire & Rubber Co.,* 426 N.W.2d 826, 832 (Minn. 1988) (en banc), *cert. denied,* 492 U.S. 926 (1989).

There being no question that this case presents a true conflict

of laws, *see Lommen v. City of East Grand Forks*, 522 N.W.2d 148, 149 (Minn. Ct. App. 1994), we proceed to the next step of our analysis.

III.

Federal courts sitting in diversity apply the forum state's conflict of laws rules. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). Under Minnesota law, the first issue that must be resolved before we may choose between Nebraska and Minnesota law is whether the law at issue is substantive or procedural. If the law is procedural, then we apply the law of the forum state. If, on the other hand, it is substantive, the choice of law analysis continues to the next step. *Gate City Fed. Sav. & Loan Ass'n v. O'Connor*, 410 N.W. 2d 448, 450 (Minn. Ct. App. 1987). Minnesota law controls the substantive/procedural determination. *Id.*

In Minnesota " '[i]t has long been recognized that substantive law is that part of law which creates, defines, and regulates rights, as opposed to "adjective or remedial" law, which prescribes method [sic] of enforcing the rights or obtaining redress for their invasion.' " *Zaretsky v. Molecular Biosystems, Inc.*, 464 N.W.2d 546, 548 (Minn Ct. App. 1990) (quoting *Meagher v. Kavli*, 88 N.W.2d 871, 879-80 (Minn. 1958)). Nebraska's statute of repose, at least as it applies to cases like this one in which the injury-causing accident does not occur until after the ten-year repose period has expired, and Minnesota's useful life statute are relatively easy to classify under this test, and we hold that they are substantive law.[2]

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2. Most courts that have been faced with the question have found statutes of repose to be substantive law for conflict of law purposes. *See* 4 American Law of Products Liability 3d § 47:55 at 89 & n.22 and cases cited therein (1990).

Appendix B

Under Minnesota law, "statutes of limitations relate to remedy" and therefore are procedural, so that the period of time after accrual within which a party may bring an action is controlled by Minnesota law if the forum is in Minnesota. *United States Leasing Corp. v. Biba Info. Processing Servs., Inc.*, 436 N.W.2d 823, 826 (Minn. Ct. App. 1989). A statute of repose, on the other hand, directly impacts on the accrual of a cause of action in the first instance.[3] It operates as a statutory bar independent of the actions (or inaction) of the litigants—often before those litigants can even be identified. *See Zaretsky*, 464 N.W.2d at 550 (finding prejudgment interest statute procedural because, *inter alia*, it "applies to the relationship of the parties as litigants"). Although the Nebraska statute of repose does not create rights, it is no less substantive because it imposes a disability upon potential claimants. Or, viewed another way, it creates in the

3. At oral argument, the Court engaged counsel in a colloquy concerning the possibility of equitable tolling of a statute of repose, for reasons such as infancy or fraud. The Court questioned whether a statute of repose can be tolled, and, if so, whether it still can be substantive law. We do not decide those questions because they are of no consequence to this case. The accident at issue here occurred outside the ten-year repose period, long after the statute of repose barred the accrual of any cause of action based on injury, death, or damage caused by the truck. The elements of fraud could never be met so as to toll the ten years because there could be no reliance on fraudulent statements that might cause Nesladek to sleep on her rights—because, by the time of the accident, she had no such rights. Further, if Jeremy had survived and brought his own action, again there would be no tolling for his infancy because the ten-year period was long past when the accident occurred—in fact, it may well have expired before Jeremy was even born. A statute of repose is different from a statute of limitations in this regard because a tort limitations statute does not begin to run until the injury, death, or damage occurs—or until the cause of action accrues. On the other hand, a statute of repose prevents the cause of action from accruing in the first place. It may be that, if an action accrues within Nebraska's ten-year products liability repose period, the barring of a suit brought outside the ten years is in effect a procedural bar, and the repose statute would be subject to tolling. But such is not the case here, and that possibility does not change our decision that the statute of repose, as applied to the facts of this case, is substantive law.

potential products-liability defendant a right to immunity from suit under the circumstances set out in the statute. *See Norwest Bank Neb., N.A. v. W.R. Grace & Co.—Conn.*, 960 F.2d 754, 759 (8th Cir. 1992) (interpreting Nebraska law). The statute of repose "regulates rights," not remedies. It does not dictate a "method of enforcing the rights or obtaining redress for their invasion." *Zaretsky*, 464 N.W.2d at 548 (quoting *Meagher*, 88 N.W.2d at 880). Rather, its effect is that ten years after a product first is sold *there can be no rights* to enforce, regardless of any subsequent injury related to the product's use. *Cf. Stern v. Dill*, 442 N.W.2d 322, 324 (Minn. 1989) (finding a Minnesota statute to be procedural for purposes of extending filing deadlines because "it does not change [plaintiff's] basic right to sue for negligence"). By the same token, Minnesota's useful life statute regulates the rights of a defendant in a products liability suit, that is, it creates the right to present a substantive defense—the useful life defense—to such a suit. "Expiration of useful life is a defense" and "a factor to be weighted by the jury in determining the fault of the manufacturer and the fault of the user." *Hodder*, 426 N.W.2d at 832. It is no more a procedural bar—a statute of limitations type of defense—than is the Nebraska statute of repose.[4]

Nebraska's characterization of its own statute, while not dispositive because we are applying Minnesota law, is to be considered under the choice-of-law analysis used by the Minnesota courts. *See Myers v. Government Employees Ins. Co.*, 225 N.W.2d 238, 241 (Minn. 1974) (considering decisions from Louisiana state courts when deciding whether a Louisiana law was substantive or procedural); *see also Mason v. Spiegel, Inc.*, 610 F. Supp. 401, 404 n.2 (D. Minn. 1985) (noting that in a conflict of laws case Minnesota "will be guided, at least

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4. Indeed, Nesladek does not even suggest that the Minnesota useful life statute is a procedural law. It thus appears to be conceded that it is substantive for purposes of Minnesota's choice-of-law analysis.

partially," by a state's characterization of its own law as substantive or procedural). Nebraska state courts have yet to squarely hold *in a conflicts case* that Neb. Rev. Stat. § 25-224(2) is substantive rather than procedural law. Nevertheless, the comments that courts have made as regards the statute leave little doubt about how they would rule if faced with the question. For example, the Nebraska Supreme Court has described the "immunity afforded by a statute of repose" as "a right which is as valuable to a defendant as the right to recover on a judgment is to a plaintiff." *Givens v. Anchor Packing, Inc.*, 466 N.W.2d 771, 774 (Neb. 1991). "These are *substantive rights* recognized by Nebraska law and protected by its Constitution." *Id.* (emphasis added); *see also Norwest Bank*, 960 F.2d at 759. We think it clear that Nebraska state courts see the Nebraska statute of repose as substantive law.

Finally, we note that the Minnesota Court of Appeals on at least one occasion has noted its disinclination "to classify anything as procedural because of the potential that doing so will encourage forum shopping." *Zaretsky*, 464 N.W.2d at 550 n.2. Both Nesladek and her husband admitted that they moved to Minnesota in part because they had consulted an attorney and were aware that under Nebraska law their case was a non-starter, whereas Minnesota's law was more favorable to a suit against Ford.[5] Thus forum shopping clearly is a factor in this case, which further reduces any possibility that a Minnesota court would classify either of the statutes at issue here as procedural.

Having determined that the Minnesota courts would characterize the statutes in question as substantive does not end

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5. The other reasons given were Nesladek's desire to attend school at St. Scholastica in Duluth, which, according to Ford's brief at 23 (and unchallenged by Nesladek), she never has done, and the family's desire to move away from the site of the accident and of Jeremy's eventual death.

our inquiry; it means only that we do not automatically apply Minnesota law. We must now go forward and, applying Minnesota's choice-of-law rules, determine whether Nebraska or Minnesota law applies.

IV.

In 1973, the Minnesota Supreme Court adopted Professor Robert A. Leflar's choice-influencing considerations for choice of law analysis. *Milkovich v. Saari*, 203 N.W.2d 408 (Minn. 1973) (en banc). The District Court applied these considerations in reaching its conclusion that Nebraska's substantive law governs this case. The Leflar analysis includes five factors, and we consider each in turn.

A. Predictability of Result

As in most tort cases, predictability of result is of little relevance here. *See Lommen*, 522 N.W.2d at 150. This factor goes to whether the choice of law was predictable before the time of the transaction or event giving rise to the cause of action, not to whether that choice was predictable after the transaction or event. By definition, accidents are unplanned, so in the ordinary tort case the parties can claim no legitimate expectation that a certain state's law would apply in an action on an unanticipated event.

B. Maintenance of Interstate Order

Nesladek would have us ignore this factor as irrelevant in tort cases.[6] It is true that some Minnesota opinions dealing with

6. Nesladek's main brief and her reply brief include this quotation: "[T]he *Milkovich* line of cases involving foreign torts makes the advancement of the forum's governmental interest and better rule of law *the only* relevant (Cont'd)

this issue in tort cases skip the analysis of this consideration (the first three considerations, in fact). But the Minnesota Court of Appeals as recently as September 1994 considered all five factors (the first to a lesser degree) in a tort case, noting only that "[t]ort actions generally do not implicate party expectations," *id.* at 150, and discussing the remaining factors at some length. *Id.* at 150-53. We reject Nesladek's contention that Minnesota law *per se* precludes the application of any of the five Leflar factors in tort cases.

In the circumstances of this case, this consideration becomes quite relevant. "[M]aintenance of interstate order [in tort cases] is generally satisfied as long as the state whose laws are purportedly in conflict has sufficient contacts with and interest in the facts and issues being litigated." *Myers*, 225 N.W.2d at 242. The record here does not support the choice of Minnesota law on this ground.

Although not so limited so as to precipitate a constitutional challenge from Ford (Ford does do business in Minnesota), Minnesota's contacts with this litigation nevertheless are tenuous, essentially limited to two: (1) Nesladek now lives and serves as trustee of Jeremy's estate in Minnesota, and (2) the allegedly defective automatic transmission gear selection

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(Cont'd)
considerations." Appellant's Brief at 9; Appellant's Reply Brief at 6 (minor misquote in Reply Brief) (emphasis added by Nesladek in Reply Brief). The briefs cite *DeRemer v. Pacific Intermountain Express Co.*, 353 N.W.2d 694, 697 (Minn. Ct. App. 1984). There is no such quotation anywhere in that opinion. We do find the quoted language in *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43, 48 (Minn. 1979), *aff'd*, 449 U.S. 302 (1981), but it is preceded by this phrase, which Nesladek conveniently omits: "Plaintiff argues, and the trial court agreed, that . . . ." This selective quoting is very misleading to the Court. The *Hague* court was not adopting such a rule but was merely stating the plaintiff's argument. In fact, the court, noting that the case had elements of both tort and contract, looked at all five factors.

system, while manufactured and assembled in Indiana, was installed into the 1976 truck in Ford's St. Paul, Minnesota, assembly plant. The composite truck owned by the Nesladeks was not purchased, licensed, modified, or maintained in Minnesota. The accident did not occur in Minnesota, none of Jeremy's medical treatment took place in Minnesota, and no medical expenses were incurred in Minnesota. All of the foregoing events took place in Nebraska, except for a brief period of rehabilitation treatment for Jeremy in Texas. Minnesota thus has little "interest in the facts and issues being litigated." *Id.*

In determining the relevance of the maintenance-of-interstate-order factor in a given case, "the court may also consider whether or not application of Minnesota law will encourage forum shopping." *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43, 49 (Minn. 1979), *aff'd*, 449 U.S. 302 (1981); *see also Lommen*, 522 N.W.2d at 151 ("One particular concern in choice-of-law methodology is to minimize forum shopping designed to influence choice of law."). Maintenance of interstate order becomes "a strong consideration" if there is any evidence that Nesladek moved to Minnesota "for the purpose of bringing suit." *Hague*, 289 N.W.2d at 49. As discussed *supra*, there is indeed such evidence in this case, thus supporting the application of Nebraska law.

We conclude that the maintenance-of-interstate-order factor favors the choice of Nebraska law. Nebraska is the state in which almost all the events that gave rise to this lawsuit occurred. In contrast, Minnesota has only the remotest connection with the subject matter of the case. Moreover, the Nesladeks have admitted to forum shopping in this case, a practice that undercuts the maintenance of interstate order.

C. Simplification of the Judicial Task

This consideration would seem to have little relevance here. The District Court is capable of determining, interpreting, and applying either the law of Nebraska or the law of Minnesota, since both are straightforward and there is no indication that the plain language of the statutes and the courts' interpretations of them are inadequate to provide the guidance a trial court might wish to have. *See Jepson v. General Casualty Co.*, 513 N.W.2d 467, 472 (Minn. 1994) (en banc).

D. Advancement of the Forum's Governmental Interests

As a matter of Minnesota law, this factor requires analysis not only of Minnesota's governmental interests, but also of Nebraska's public policy. *See Gate City*, 410 N.W.2d at 451; *Myers*, 225 N.W.2d at 242. It is hard to conceive of the case where the application of forum law would not advance the forum's governmental interests. A forum state's law reflects the forum state's interests—or it would not be the law of the forum. Therefore this consideration would always favor the choice of forum law unless, as a Minnesota court has declared, we consider "the relative policy interests of the two states." *Lommen*, 522 N.W.2d at 152.

In considering the relative policy interests of Nebraska and Minnesota, we note that both the Nebraska statute of repose and the Minnesota useful life statute advance the same governmental interest, to wit, restricting liability for injury allegedly caused by older products. *See Hodder*, 426 N.W.2d at 832; *see also Norwest Bank*, 960 F.2d at 758 (giving possible rationales for the restriction in Nebraska). The Minnesota Supreme Court reviewed the useful life statute's legislative history and

concluded: "The legislature was concerned about expanding products liability and intended to limit open-ended liability for aging products." *Hodder,* 426 N.W.2d at 830. The Nebraska statute of repose clearly advances the same interest the Minnesota useful life statute advances, even as it furthers Nebraska's own governmental interest.

The opinion in *Hodder,* an en banc decision of the Minnesota Supreme Court, suggests that useful life statutes "seem incoherent both theoretically and operationally." *Id.* at 832 (quoted authority omitted). The authoring justice "wonders if it is possible to devise a workable repose statute that measures the time period by a useful life concept." *Id. Hodder* had no other justices writing, so we feel justified in concluding that repose statutes are not an aberration in the eyes of the Minnesota Supreme Court.[7]

As Nesladek points out, Minnesota does have an interest in "providing access to its courts for its citizens," *Myers,* 225 N.W.2d at 243, an interest that will not be advanced by application of Nebraska law. Application of Minnesota law, however, does not advance Minnesota's countervailing interest in discouraging forum shopping. *See Jepson,* 513 N.W.2d at 471. Because of the distinct presence of forum shopping in this case, we have good reason to conclude that the balance of interests favors application of Nebraska law. We point out again that the

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7. The *Hodder* court's discussion of other states' statutes of repose that contain a presumptive period of useful life was neutral, except for a question about constitutionality. *See Hodder,* 426 N.W.2d at 830 & n.3. The Nebraska Supreme Court since has upheld the validity of section 25-224(2) against claims that it violated the state and federal due process and equal protection clauses, and the state constitution's access-to-courts provision. *Spilker v. City of Lincoln,* 469 N.W.2d 546 (Neb. 1991).

Nesladeks, although now Minnesota citizens, were Nebraska citizens when they acquired the two Ford trucks that Ken Nesladek and Harvey Kreikemeirer combined into one truck and at the time of Jeremy's injury and death.

Further, we conclude that the Nebraska statute of repose does not go so far as to offend another of Minnesota's interests upon which Nesladek relies on, compensating tort victims. *See Jepson,* 513 N.W.2d at 472. Nesladek contends that Minnesota products liability law advances this interest, as the Nebraska statute of repose does not. Although Nesladek's assertion may be true for Minnesota products liability law generally, it is not true for the state's useful life statute. The useful life statute is a defense to a tort action, and can be said to "advance" the interest in compensating tort victims only relative to the Nebraska statute of repose. The useful life of the modified truck would be available as a defense for Ford if Minnesota law applied, and it is purely speculative whether Nesladek would be successful on her claim if met by such a defense. In these circumstances, we conclude that the other governmental interests discussed here have more relevance under this choice-influencing consideration than Minnesota's interest in compensating tort victims. *See id.* ("On the facts of this case, however, our choice is influenced more by our analyses of predictability and maintenance of the interstate order than it is by our governmental interest in compensating a tort victim.").

We believe that on balance this factor favors the choice of Nebraska law.

E. The Better Rule of Law

"Concern for the 'better law' is part of a comprehensive test

and is to be exercised only when other choice-influencing considerations leave the choice of law uncertain." *Myers*, 225 N.W.2d at 244; *see also Gate City*, 410 N.W.2d at 451. We conclude that "factual contacts with the forum and state policy considerations" (that is, our analysis of the other Leflar factors) favor the application of Nebraska law, and so we need not decide which state has the better law.[8] *DeRemer v. Pacific Intermountain Express Co.*, 353 N.W.2d 694, 698 (Minn. Ct. App. 1986). In any event, under Professor Leflar's instructions to choose as the better law that which makes "good socio-economic sense for the time when the court speaks," we are not prepared to say that either Nebraska law or Minnesota law is superior to the other. *Jepson*, 513 N.W.2d at 473 (quoting Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 Cal. L. Rev. 1584, 1588 (1966)). Each merely reflects a different approach to the same problem, both "neither better nor worse in an objective way." *Jepson*, 513 N.W.2d at 473.

V.

For the reasons discussed above, we hold that this case is subject to the Nebraska statute of repose. Accordingly, the judgment of the District Court is affirmed.

LAY, Senior Circuit Judge, dissenting.

I respectfully dissent.

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8. The Minnesota Court of Appeals recently noted "that the Minnesota Supreme Court has given the 'better law' consideration no significant weight in a case for more than a decade." *Lommen v. City of East Grand Forks*, 522 N.W.2d 148, 153 n.4 (Minn. Ct. App. 1994).

Appendix B

Although this is a diversity action and is not binding authority beyond this case, at least as far as Minnesota law is concerned, I nevertheless feel compelled to dissent as to the majority's choice-of-law analysis.[1] I do so because I think it is obvious that both the district court and the majority have misconstrued the controlling choice-of-law rules under Minnesota law. The majority emphasizes that because the plaintiff is guilty of forum shopping, Nebraska, not Minnesota law should be applied. With all due respect, this line of reasoning

1. I do not quarrel with the majority's ultimate finding that Nebraska's statute of repose is substantive law. However, I do think the question is much closer than the majority acknowledges. I believe it is significant that the statute of repose appears under the civil procedure section of Nebraska's code. See Neb. Rev. Stat. § 25-224. I also feel the majority misses the emphasis of the court's colloquy at oral argument relating to the equitable tolling of the statute of repose for reasons of infancy or incapacity. *Lawson v. Ford Motor Co.*, 408 N.W.2d 256, 258 (Neb. 1987), and *Macku v. Drackett Products Co.*, 343 N.W.2d 58, 61 (Neb. 1984), simply illustrate that the statute of repose has or could have been tolled in the past on the basis of infancy or incapacity, and that this fact generally demonstrates that it is a procedural provision. *Lawson* and *Macku* hold that Nebraska's tolling provision for infancy and incapacity tolls Neb. Rev. Stat. § 25-224(4), rather than section 25-224(2), which is at issue in this case. Yet because section 224(4) extended section 224(2) by two years after the latter statute's enactment, it functionally served as a statute of repose for actions existing at that time. *Lawson* demonstrated that this repose period could indeed be tolled:

> Section 25-224(4) provides that notwithstanding the 10-year ban imposed by § 25-224(2), "any cause of action or claim which any person may have on July 22, 1978, may be brought not later than two years following such date."
>
> The foregoing 2-year period of limitations, however, is extended by [Nebraska's tolling provision].

408 N.W.2d at 258.

(Cont'd)

makes little sense. The majority's approach offers a sanction or punishment rather than an analysis as to choice of law under Minnesota's conflicts methodology.

More importantly, the Minnesota Supreme Court has been quite clear that in tort situations, only the last two items of Professor Leflar's choice-influencing considerations are relevants. The majority fails to provide a careful analysis of existing Minnesota law. In *Schwartz v. Consolidated Freightways Corp.*, 221 N.W.2d 665, 668 (Minn. 1974), *cert. denied*, 425 U.S. 959 (1976), and *Bigelow v. Halloran*, 313 N.W.2d 10, 12 (Minn. 1981), the Minnesota Supreme Court stated that only the last two items of Professor Leflar's five-point methodology are relevant to tort cases. These two considerations are "1) advancement of the forum's governmental interests; and 2) application of the better rule of law." *Bigelow*, 313 N.W.2d at 12; *Schwartz*, 221 N.W.2d at 668.

I am not aware that the *Schwartz* and *Bigelow* cases have been overruled. In fact, in *DeRemer v. Pacific Intermountain Express Co.*, 353 N.W.2d 694, 697 (1984), the Minnesota Court of Appeals, following the analysis in *Schwartz*, *Bigelow*, and *Milkovich v. Saari*, 203 N.W.2d 408 (Minn. 1973), reiterated: "The relevant considerations in tort cases are two: (1)

(Cont'd)

The fact that tolling provisions are not at issue in this case is not material. The point is that substantive law and substantive rights cannot be tolled as has been done with Nebraska's statute of repose. However, I leave this to the Nebraska Supreme Court to more definitively resolve in the event that they need to do so, and simply recognize that our opinion is only controlling in this case. Thus, I do not necessarily agree with the analysis made by the majority opinion on the substantive aspect of the statute of repose, but I assume that it is a substantive provision for purposes of this dissent.

advancement of the forum's governmental interests; and (2) application of the better rule of law."

Moreover, the *Schwartz* court clearly discounted the relevance of forum shopping in Minnesota's choice-of-law analysis. The court stated:

> Defendants argue that plaintiff was forum shopping. Suffice it to say that the courts of this state are open to those residents and nonresidents alike who properly invoke, within constitutional limitations, the jurisdiction of these courts. In the case at bar, plaintiff is a Minnesota resident who is currently suffering from extensive and severe injuries. It would be at least plausible to presume that Minnesota courts would be plaintiff's logical choice. Further, it is noteworthy that plaintiff did not first bring his action in another state and then later bring suit in this state.

221 N.W.2d at 669.

Furthermore, to support its use of forum shopping, the majority quotes *Lommen v. City of East Grand Forks*, 522 N.W.2d 148, 151 (Minn. Ct. App. 1994), out of context. The *Lommen* court, however, actually followed the principle in *Schwartz* and concluded that a party's choice of forum should be irrelevant:

> The City asserts that Lommen might have filed suit in Minnesota to avoid North

> Dakota's seat belt defense and because North Dakota does not provide for joint and several liability; the City argues that Minnesota law should thus apply simply because Lommen voluntarily chose the Minnesota forum. To the extent Lommen may have been forum shopping, we note that we do not prefer Minnesota law on any *substantive* issue simply because Minnesota is the forum. *See* Robert A. Leflar, *American Conflicts Law* § 90, at 182 (3d ed. 1977) ("Mere forum preference, as such and by itself, is not a valid *reason* for any choice-of-law result." (emphasis in original)). *Choice of forum ought not determine choice of law.*

522 N.W.2d at 151-52 (final emphasis added).

The majority also places reliance upon *Jepson v. General Casualty Co.*, 513 N.W.2d 467 (Minn. 1994), in its discussion of forum shopping. Yet the majority fails to recognize that *Jepson* is not a tort case but is in fact a case involving insurance contracts. *See id.* at 470. In such a case, it is clear that all five of the Leflar considerations become relevant in determining the applicable choice of law. *Jepson* stated that under certain narrow circumstances, Minnesota does have an interest in preventing forum shopping in contract cases. *Id.* at 470. As the *Jepson* Court said, this is true:

> where we would be sending a message to those people living on our borders to take advantage of the benefits our neighboring states offer in terms of lower insurance rates,

> lower vehicle registration fees, and sales taxes, and then, if they are injured, to take advantage of Minnesota's greater willingness to compensate tort victims. Minnesota does not have an interest in encouraging that conduct.

513 N.W.2d at 471-72. The dangers which *Jepson* addresses in the context of an insurance contracts suit are simply not present in the current action, which is strictly a tort case.

Similarly, I point out that in *Hague v. Allstate Insurance Co.*, 289 N.W.2d 43 (Minn. 1979), *aff'd*, 449 U.S. 302 (1981), in which the court discussed all five choice-of-law factors, it again was analyzing the stacking of insurance contracts. The court makes clear in the *Hague* case that its analysis of the choice of laws was to examine both tort and contract considerations. *Id.* at 48. It is significant that the trial court had deemed the advancement of the forum's governmental interest and the better rule of law the only relevant considerations. *Id.* It is interesting to note that the court held the trial court was affirmed. *Id.* at 49. Nonetheless the court analyzed each of these interests because it was not only dealing with the question of compensation of a tort victim, but also with the policies and interests underlying stacking insurance contracts. *Id.* at 48-49.

Thus, I think the majority misstates the conflict of law analysis that exists in Minnesota, and its approach is clearly contrary to the beacon cases of *Schwartz, Bigelow,* and *Milkovich.* These cases first make clear that because this is a tort action, the majority should have considered only the advancement of the forum's governmental interest and the better rule of law. In addition, I think the policy in Minnesota is that

which the *Schwartz* case has previously announced; namely, the Minnesota courts are open to those residents and nonresidents alike who properly invoke their jurisdiction. *See* 221 N.W.2d at 669. As the court in the *Lommen* case recently stated, forum shopping is not a valid reason for any choice-of-law result and should not, under the dictates of common sense, determine the choice of law. *See* 522 N.W.2d at 151-52. With these principles in mind, I turn to the methodology used under Minnesota law to determine the proper law to apply in this case.

In analyzing the advancement of the forum's governmental interest, we look to both factual contacts and policy considerations. *See, e.g., Schwartz,* 221 N.W.2d at 668. I respectfully submit that Minnesota has as great as, if not more contacts with plaintiff's lawsuit than Nebraska. The Nesladek family, including Plaintiff Jill Nesladek, trustee for the estate of Jeremy Nesladek, are residents of Minnesota. They have lived here since May of 1992. They pay taxes under Minnesota law. They either rent or own a home in Minnesota. Even if Jill Nesladek and her family moved to Minnesota solely for the purpose of commencing the law suit, which they did not, it still remains that she is a legitimate resident of this state, and as the Minnesota courts have made clear, its courts are open to both residents and nonresidents. *See Schwartz,* 221 N.W.2d at 669.

In addition, Minnesota also has substantial contacts with the alleged wrongdoing; that is, Ford assembled and then placed in the stream of commerce the actual vehicle in question. The allegedly defective vehicle which brought about the wrongful death was sold commercially by Ford in the state of Minnesota. The fortuitous fact that the wrongful death happened to occur in Nebraska or that the plaintiff lived in Nebraska at the time of the occurrence is not of any greater weight than Minnesota's

contacts. At the time the law suit was filed, Minnesota's interest in this litigation is at least as great as, and probably greater than, Nebraska's.[2]

Turning to policy considerations, the laws in question — Minnesota's useful-life statute and Nebraska's statute of repose — both further the interest of placing some time limit on the bringing of products liability actions. Yet Minnesota clearly has an additional policy interest in deterring Ford from putting a defective product into the stream of commerce within its borders. *See. e.g., Mitchell,* 913 F.2d at 250. This interest is better served by Minnesota's useful-life statute because it is less restrictive and therefore may contribute to greater deterrence than Nebraska's

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2. Courts frequently apply the law of the jurisdiction where an allegedly defective product was assembled or placed into the stream of commerce, or where the plaintiff is domiciled, rather than the law of the state where the accident or injury occurred. *See e.g., Mitchell v. Lone Star Ammunition. Inc.,* 913 F.2d 242, 250 (5th Cir. 1990) (holding Texas's substantive law should apply rather than the law of the state where the accident occurred, because Texas has a particularly strong interest "when the defective product in question was manufactured and placed in the stream of commerce" in Texas); *In re Air Crash Disaster,* 769 F.2d 115, 120 n.7 (3d Cir. 1985) (choosing to apply Pennsylvania law because that state has the greatest interest in governing the manufacture of products within its borders, although the helicopter crash at issue happened elsewhere), *cert. denied,* 474 U.S. 1082 (1986); *Turcotte v. Ford Motor Co.,* 494 F.2d 173, 177-78 (1st Cir. 1974) (concluding Rhode Island, the plaintiff's domicile, had a stronger governmental interest in the suit than Massachusetts, the state where the automobile accident occurred, because Rhode Island has a strong interest in compensating its residents for torts resulting in severe injuries or deaths); *Lewis-DeBoer v. Mooney Aircraft Corp.,* 728 F. Supp. 642, 645 (D. Colo. 1990) (finding fact that the defendant made and sold allegedly defective airplane door latch in Texas, outweighed fact that plaintiffs were from Colorado and plane crash occurred there); *Kozoway v. Massey-Ferguson Inc.,* 722 F. Supp. 641, 643 (D. Colo. 1989) (determining Iowa law rather than law of Alberta, Canada should apply because defective hay baler was manufactured in Iowa, while fact that plaintiff was injured on his farm in Canada was merely fortuitous).

law. In addition, Minnesota's general interests in allowing access to its courts for its residents and compensating tort victims tips the balance further in favor of Minnesota's rule. *See. e.g., Bigelow,* 313 N.W.2d at 12 ("[T]his court has often said that it is in the interest of this state to see that tort victims are fully compensated."); *Myers v. Government Employees Ins. Co.,* 225 N.W.2d 238, 243 (Minn. 1974) ("Minnesota . . . advances its governmental interest by providing access to its courts for its citizens . . . .").

Thus, the advancement of the forum's government interest, both terms of factual contacts and policy considerations, weighs in favor of applying Minnesota law. Even assuming, *arguendo,* that this factor points equally to Minnesota and Nebraska, Minnesota's useful-life statute is the better rule of law under the circumstances existing *in this particular case.* The imposition of a repose period in this factual context would not serve a worthwhile purpose. A statute of repose is based on the idea that a defect does not really exist if the product has been in use for longer than the repose period. Yet here, at least according to the plaintiff's allegations, Ford has known for many years of this defect and failed to recall the vehicle or properly warn of its dangers. To now allow Ford to escape the possibility of liability merely because the repose period has passed, even though Ford may have known of the existence of the defect long before the statute's running, serves no purpose but to arbitrarily punish the plaintiff. Thus, Nebraska's inflexible statute of repose is not well suited for these circumstances.

Rather, because this case involves a known defective product, the equities favor allowing the plaintiff to bring the cause of action and then letting a jury decide whether the product has run the course of its useful life. I contend, therefore, that

Appendix B

Minnesota's law should be applied under Minnesota's choice-of-law methodology.

For the foregoing reasons, I respectfully dissent.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX C — EIGHTH CIRCUIT ORDER DENYING MOTION TO CERTIFY FILED JUNE 10, 1994

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 94-1885MND

Jill Nesladek, etc.,

Appellant,

vs.

Ford Motor Company,

Appellee.

Appeal from the United States District Court
for the District of Minnesota

Appellant's motion to certify a question of law has been considered by the Court and is denied.

June 10, 1994

Order Entered at the Direction of the Court:

s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX D — PETITIONER'S MOTION BEFORE THE EIGHTH CIRCUIT TO CERTIFY QUESTIONS TO MINNESOTA SUPREME COURT DATED MAY 18, 1994

IN THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Docket No. 94-1885

JILL NESLADEK, as Trustee for the Heirs and Next of Kin of Jeremy J. Nesladek, Decedent,

Appellant

vs.

FORD MOTOR COMPANY,

Appellee

APPELLANT'S MOTION TO CERTIFY QUESTIONS OF LAW TO THE SUPREME COURT OF MINNESOTA

Pursuant to Minn. Stat. § 480.061 (1992), Appellant moves the Court to certify the questions listed below to the Supreme Court of Minnesota. Pursuant to Rule 28A (h) (10), the district court's Memorandum Opinion and Order of March 7, 1994 is attached hereto.

STATEMENT OF ISSUE PRESENTED BY THIS MOTION

Whether the Minnesota choice of law questions presented in this case warrant certification to the Supreme Court of Minnesota.

Appendix D

STATEMENT OF THE CASE

This is a wrongful death action initially filed in a Minnesota state court in June of 1993. The case involves a design defect and is founded upon established theories of products liability. Ford removed the case to the Minnesota District Court pursuant to 28 USC §1441 (a). Ford then filed a Rule 56 motion arguing that Nebraska's ten year ultimate statute of repose, Neb. Rev. Stat. §25-224(2), should apply to this cause of action. The laws of Nebraska and Minnesota are in conflict. Nebraska is one of the five states in the Union with an ultimate products liability statute of repose. Minnesota is aligned with the forty-five states which do not have an ultimate products liability statute of repose. The lower court examined Minnesota's choice of law rules, applied the law of Nebraska and sustained Ford's Motion for Summary Judgment. This appeal exclusively concerns Minnesota choice of law questions.

STATEMENT OF FACTS

Appellant and all of decedent's heirs are residents and citizens of Minnesota. Appellant was appointed Trustee by the District Court of St. Louis County in Duluth, Minnesota .

Appellee, Ford Motor Company, is a manufacturer of pickup trucks equipped with automatic transmission gear selection systems. Ford's connection to Minnesota is substantial (Ex. 1, 2, 21, 24, 25, 26 and 29.)

On April 18, 1990, Appellant's decedent was seriously injured when a Ford pickup jumped out of park and into reverse. This incident took place on the Nesladek family farm in Nebraska. On February 20, 1992, Appellant's decedent died as a direct proximate result of the injuries he sustained.

Appendix D

The product involved was the family's farm pickup truck. For reasons which are unrelated to this litigation, the pickup truck was a combination of a 1973 Ford chassis and a 1976 Ford cab. The original 1973 cab was damaged and was replaced with a 1976 cab prior to the failure. The 1973 and 1976 cabs were interchangeable and were regularly and routinely serviced as such by Ford Motor Company. (Ex. 27, 31, 36, 37 and 40.) The procedure required no modification or customization of the vehicle. Nothing associated with placing the gear shift selector, steering column and linkage system of the 1976 cab on top of the 1973 chassis played a role in the failure. This is a design defect case. (Ex. 27, 30, 31, 36 and 37)

The upper portion of the automatic transmission gear selection system was installed at Ford's St. Paul factory and placed into the stream of commerce in 1975. (Ex. 33) The lower portion of the automatic transmission gear selection system was installed at one of Ford's Michigan factories and placed into the stream of commerce in 1972. The product failed in Nebraska and caused the injuries in Nebraska on April 18, 1990. After Ford manufactured the transmission, Nebraska enacted an ultimate 10 year statute of repose governing products liability actions. Neb. Rev. Stat. §25-224(2).

Minnesota has no borrowing statute which would force application of Nebraska's statute of repose to this case. (Ex. 15)

Minnesota and Michigan do not have products liability statutes of repose which would operate as a bar to Appellant's claim.

The claim is premised upon established products liability law involving a well litigated design defect. *Ford Motor Co. v.*

Nowak, 638 S.W.2d 582 (1982); *Lenhart v. Ford Motor Co.*, 683 P.2d 1097 (Wash. 1984), and *Kallio v. Ford Motor Co.*, 391 N.W.2d 860 (Minn. App. 1986.) Exhibit 38 contains Karen Branan's excellent non-technical explanation of the design defect.

STANDARD OF REVIEW

The choice of law made by the lower court will be reviewed *de novo. Whirlpool Corp. vs. Ritter*, 929 F.2d 1381, 1321 n.4 (8th Cir. 1991). With the enactment of Minn. Stat. § 480.061, the Minnesota legislature has authorized federal courts to certify questions of state law directly to the Minnesota Supreme Court. The standard for determining when certification is appropriate is discretionary. *Hatfield v. Bishop Clarkson Memorial Hospital*, 679 F.2d 1258, n.4 (8th Cir. 1982).

ARGUMENT

This Court has previously held that certification is improper "[a]bsent a 'close' question and lack of state sources enabling a non-conjectural determination." *Shakopee Mdewakanton Sioux v. City of Prior Lake*, 771 F.2d 1153, 1157 (8th Cir. 1985). The question presented for certification should be likely to recur. *Perkins v. Clark Equipment Co.*, 823 F.2d 207, 210 (8th Cir. 1987). Furthermore, certification is proper where controlling precedents are lacking and the question involves public policy of the state whose law is unclear. *Kaiser v. Memorial Blood Center of Minneapolis*, 938 F.2d 90, 93 (8th Cir. 1991). Where such conditions are present, certification is a wise exercise of a court's discretion. The certification procedure "does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism." *Lehman Brothers v. Schein*, 416

U.S. 386, 391, 94 S.Ct. 1741, 1744 (1974). Public policy matters are better left to the state supreme court.

> **Federal courts of appeals perform a different role when they decide questions of state law than they do when they decide questions of federal law. In the former case, these courts are not sources of laws but only reflections of the jurisprudence of the courts of a state. While in deciding novel federal questions, courts of appeals are likely to ponder the policy implications as well as the decisional law, only the latter need be considered in deciding questions of state law.**

Salve Regina College v. Russell, 499 U.S. 225, 111 S.Ct. 1217, 1227 (1991) (Rehnquist, C. J., dissenting).

A Federal Court sitting in diversity is bound to apply the choice of law principles of the forum state in the case before it: *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941). Accordingly, this Court is bound to apply Minnesota's choice of law principles. Minnesota requires that its laws be applied if a conflict exists between procedural laws. *Davis vs. Furlong*, 328 N.W.2d 150 (Minn. 1983).

As to conflicts in substantive law, Minnesota choice of law requires application of Professor Leflar's five choice influencing considerations to resolve the conflict. *Milkovich vs. Saari,* 295 Minn. 155, 203 N.W.2d 408 (1973). Those choice-influencing considerations are: (1) predictability of results; (2) maintenance of interstate order; (3) simplification of the judicial task; (4)

advancement of the forum's governmental interests; and (5) application of the better rule of law. *Id.* at 412.

1. *The Choice of Law Question Presented is Close.*

While this case must be reviewed *de novo* and the district court's opinion is entitled to no weight, the opinion may be reviewed for certification purposes. The March 7, 1994 Memorandum Opinion at page 7 states that Minnesota courts have not even examined the initial prong of a conflict case: the procedural/substantive characterization. Then, after applying all five choice-influencing considerations, the lower court concluded:

1. Predictability of results was not relevant;

2. The maintenance of interstate order factor favored application of Nebraska law;

3. Simplification of the judicial task was irrelevant;

4. Application of Nebraska law advanced Minnesota's governmental interests; and

5. A decision as to the better rule of law was not necessary.

The district court's opinion stands for the proposition that the choice of law question is close.

2. *The Choice of Law Questions Presented are Questions of First Impression.*

At several points in the choice of law analysis, this Court will

be required to resolve determinative issues for which controlling precedent is lacking in Minnesota jurisprudence. After a conflict of laws is determined to exist, this Court will decide if the conflict involves procedural or substantive law. Minnesota courts adhere to the traditional view that time limitations on actions are procedural laws. *American Mutual Liability Ins. Co. v. Reed Cleaners,* 122 N.W.2d 178, 180 n. 1 (Minn. 1963). However, no Minnesota court has addressed a time limitation similar to Neb. Rev. Stat. § 25-224(2). No controlling precedent exists to guide this Court in the procedural/substantive characterization.

If this Court decides that a conflict of substantive laws is presented, the Court must then evaluate the five choice-influencing considerations. Again, controlling precedent is unavailable for this aspect of the decision in several respects. The lack of precedent is particularly significant considering Minnesota's choice of law rules. While other rules for resolving conflicts of laws, such as the Restatement's interest analysis or the center of gravity approach, use more objective determinants, Minnesota uses more subjective criteria. Precedent from state courts is much more important when the state uses Professor Leflar's "better" law approach. Minnesota choice of law theory requires qualitative and moral judgments as to the respective laws. Where precedent is lacking, this Court is required to intuitively ascertain the judgment of the Minnesota court. Speculation and conjecture are the necessary by-products of an intuitive analysis.

An early inquiry by this Court will be whether Minnesota's interests are advanced by the application of Nebraska's ten year time limit. This consideration embodies Minnesota's concern that it not be called upon to enforce rules inconsistent with its concepts of fairness and justice or administer laws that run afoul

of Minnesota socio-legal policies. *Milkovich*, 203 N.W.2d at 414; *Hime v. State Farm Fire & Cas. Co.*, 283 N.W.2d 829, 833 (Minn. 1979). This Court is unguided in its measurement of the Nebraska statute against these Minnesota public policy standards.

This Court is equally unguided by any Minnesota opinion deciding which of the conflicting laws is the better rule of law. Such a qualitative, value-laden evaluation is based wholly on the policy considerations reflected in Minnesota court opinions. Where those courts have never passed upon a time limitation similar to Neb. Rev. Stat. 25-224(2), no reflection exists. This Court would be required to decide which law Minnesota would find "better" and would lack Minnesota precedent to guide its decision. Given the alternative of certification, no speculation is required. Certification of these public policy questions would also avoid the inequitable administration of justice that could arise if a Minnesota court were later faced with a similar statute and reached the opposite conclusion of this Court.[1]

Finally, this Court may be called upon to ascertain whether Minnesota has established a policy relative to forum shopping. Professor Leflar's second choice influencing consideration, maintenance of interstate order, is probably not relevant to tort cases filed in Minnesota. *Myers v. Government Employees Ins. Co.*, 225 N.W.2d 238 (Minn. 1974), and *Hague v. Allstate*

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1. When faced with a statute of repose from the state of North Carolina, the Sixth Circuit ruled that a product liability action could be maintained in Michigan despite the North Carolina law. *Mahne v. Ford Motor Company* 900 F.2d 83 (6th Cir. 1990). Three years later, a Michigan Court of Appeals ruled that Michigan choice of law rules required the application of a Florida statute of repose. *Farrell v. Ford Motor Company*, 501 N.W.2d 567 (Mich. Ct. App. 1993). This inequitable administration of justice could have been avoided if a Michigan state court had been given the first opportunity to pass on this important issue of state law.

Insurance Co., 289 N.W.2d 43 (Minn. 1979). Unfortunately, the Minnesota Supreme Court has been rather equivocal as to whether elements of forum shopping should or should not be considered in a tort case. According to Ford and the court below, this case presents substantial elements of forum shopping. The Minnesota legislature has repealed its borrowing statute and legislatively declared that the courts of Minnesota are open to all individuals who obtain jurisdiction over a Defendant if application of Minnesota law would not deprive a Defendant of its due process rights. Both the United States[2] and Minnesota[3] Supreme Courts have made statements acknowledging that forum selection is an acceptable tool which is available to litigants. However, that term is unclear. The Minnesota Supreme Court has never been called upon to establish public policy by defining the term *forum shopping*. Since Minnesota has not defined that term, this Court is left with the unenviable task of divining not only a definition, but the task of divining the sanctions, if any, which flow therefrom. The Minnesota Supreme Court has not established whether forum shoppers are to be

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2. In *Keeton v. Hustler Magazine*, Inc., 465 U.S. 770, 779 (1983), the Court observed that: **"Petitioner's successful search for a State with a lengthy statute of limitations is no different from the litigation strategy of countless plaintiffs who seek a forum with favorable substantive or procedural rules or sympathetic local populations."** *Ferens v. John Deere*, 494 U.S. 561 (1990) was a products liability action involving a choice of law question. The Court was presented with an opportunity to establish a punitive rule, denying access to courts for forum shopping. The Court specifically declined to do so.

3. The Minnesota Supreme Court zealously respects the rights of *all* litigants and has said: **"Defendants argue that Plaintiff was forum shopping. Suffice it to say that the courts of this State are open to those residents and nonresidents alike who properly invoke, within constitutional limitations, the jurisdiction of these courts."** *Schwartz v. Consolidated Freightways Corp. of Delaware*, 300 Minn. 487, 221 N.W.2d 665, 669 (1974).

applauded and commended for utilizing Minnesota courts to obtain justice or accused and condemned for attempting to avoid an unjust result in another state. Due process requires that Appellant be given an advance definition of "forum shopping" before being labeled and punished as a forum shopper. The Minnesota Supreme Court has provided no such definition. This is clearly a case of first impression, however, as mentioned in Footnote 3, the Minnesota Supreme Court is not adverse to opening its courts to all.

3. *Considerations of comity are relevant in light of the particular issue and product involved in this case.*

Ford Motor Company is an experienced litigator of this particular product and of the statute of repose at issue. An analysis of the following two decisions is illustrative of that experience and the bizarre result obtained by the Sixth Circuit Court of Appeals' failure to consider comity:

A. *Mahne v. Ford Motor Company*, 900 F.2d 83 (6th Cir. 1990), is a Michigan choice of law case involving a defective Ford vehicle and an ultimate products liability statute of repose. Plaintiff was a Florida resident. The product failed in Florida. Florida had a products liability statute of repose which has now been repealed. The statute formerly on the books barred recovery. The court analytically examined Michigan's interest-analysis approach to choice of laws and found that Michigan's laws should be applied to the action. Despite Florida's products liability statute of repose, Plaintiff was not denied her day in Court.

B. *Farrell v. Ford Motor Company*, 199 Mich. App. 81, 501 N.W.2d 567, (1993) (leave to appeal denied by Michigan

Supreme Court on April 26, 1994) involved a set of facts almost identical to *Mahne*. Farrell's older model Ford LTD jumped out of park and into reverse, ran over and killed Mrs. Farrell. North Carolina's product liability laws contained an ultimate statute of repose. Mr. Farrell filed a lawsuit in Michigan. The Michigan Court analytically applied Michigan's interest-analysis approach to choice of laws and found that North Carolina's laws applied. Plaintiff was denied his day in court.

Absent contorted mental gymnastics, *Mahne* and *Farrell* are irreconcilable. In the interest of comity, and in order to avoid a similar irreconcilable difference between the Minnesota Supreme Court and the Eighth Circuit Court of Appeals, the choice of law question should be certified to the Minnesota Supreme Court.

4. *The questions presented for certification are general in nature and likely to recur.*

Tort victims have become much more inclined to avail themselves of choice of law options. Illustrative is *Calvert v. Roberts Dairy Co.*, 242 Neb. 664, 496, N.W.2d 491 (1993). The Nebraska Supreme Court, pursuant to a question certified to it by the Federal Court, had previously held that a defendant accrues a substantive right not to be sued after the applicable statute of limitations has run. *Givens v. Anchor Packing, Inc.*, 237 Neb. 565, 466 N.W.2d 771 (1991). That accrued substantive right is only the right not to be sued in the jurisdiction which enacted the statute of limitation. A Roberts Dairy truck was involved in an Iowa accident. Two years later, Roberts Dairy, a Nebraska corporation, obtained a substantive right. The substantive right was the right not to be sued in Iowa. The procedural law of Iowa (its two-year statute of limitations) created that substantive right.

The right did not go beyond the Iowa borders. When Calvert carried her cause of action across the Missouri River and applied Nebraska's procedural law, a unanimous Nebraska Supreme Court held that *lex fori* mandated application of Nebraska procedural law (its four-year statute of limitations). The case at bar is analogous. ***Ford has a substantive right not to be sued in Nebraska - no more.*** That right was created by Nebraska's procedural statute. Interestingly, Ms. Calvert was an Iowa resident who was injured in Iowa. She engaged in blatant result-oriented forum shopping in order to avoid Iowa's time limitation bar. The Nebraska Supreme Court did not summarily throw her out on the grounds that she was a forum shopper. To the contrary, the Court found that *lex fori* called for Nebraska's time limitation on action to be applied to the cause of action which accrued in Iowa. *Calvert* is an example of a set of facts which may be presented to the Minnesota Supreme Court and cause the question to recur. (Ex. 23)

The Seventh Circuit Court of Appeals was presented with a factual pattern similar to the one at bar in *Beard v. J. I. Case Co.*, 823 F.2d 1095 (7th Cir. 1987). Frank Beard, just like the decedent's father, was a farmer. Beard also lived in one of the five states of this Union with an ultimate statute of repose. Beard was injured when he became entangled in a cornpicker. Beard felt that the 31-year-old cornpicker was defectively designed. However, the Tennessee Products Liability Act barred any products liability action not brought within ten (10) years of manufacture. Beard filed a products liability action in Federal District Court in Wisconsin. Ford would characterize this intelligent choice of a forum as "forum shopping" and would have Beard locked out of the courtroom without any further ado. The injury took place in Tennessee. Plaintiff was a lifetime resident of Tennessee and had no connection to Wisconsin. Beard alleged that the defective

design work occurred in Wisconsin and that the action was, therefore, governed by Wisconsin law. The Seventh Circuit ruled that the law of the forum state governs whether a foreign state's period of limitation *or repose* should be considered an integral part of the substantive right. The Seventh Circuit Court of Appeals felt that labeling Tennessee's period of repose as "substantive" was too simplistic and incomplete and allowed Beard to have his day in court.

In light of Minnesota's repeal of its borrowing statute, it is not only likely, but very probable, that factual patterns similar to those presented by Beard, Farrell, Mahne, Calvert and Nesladek will be presented to the Minnesota Supreme Court in the future.

5. "Application of statutes of limitations are questions of law and public policy of particular interest to the courts of Minnesota". Kaiser v. Memorial Blood Center of Minneapolis, 938 F.2d 90, 93 (8th Cir. 1991).

The case at bar involves a choice of law between Nebraska's prohibitive statute of limitation and Minnesota's less restrictive statute of limitation. The choice of law involves $738,000.00 in medical expenses which will economically affect 35,000 Minnesota citizens. (Ex. 18, 19 and 20.) Accordingly, this public policy question should be certified to the Minnesota Supreme Court. The public policy declarations of the Minnesota legislature by the repeal of its borrowing statute and public policy declarations of the Minnesota Supreme Court should be applied to the facts presented in this case by the Minnesota Supreme Court, not a federal court left to speculate as to the possible application.

As stated above, Minnesota choice of law rules contemplate

subjective considerations like the better rule of law and whether Nebraska law advances Minnesota's governmental interests. These are questions of law and public policy of particular interest to the courts of Minnesota.

6. The state constitutional question is one of first impression.

The Minnesota Supreme Court has never passed upon whether application of a foreign state's statute of repose to a cause of action owned by a citizen of Minnesota would violate the remedy clause of the Minnesota constitution. (M. S. A. Const. Art. 1, §8). An almost identical provision in the Wisconsin Constitution is precisely why the Seventh Circuit Court of Appeals found in favor of Plaintiff and applied the law of Wisconsin to the Tennessee tort in *Beard, supra*. However, the Wisconsin Supreme Court had already spoken. Therefore, the Seventh Circuit was guided by Wisconsin precedent and was not forced to speculate. The Minnesota Supreme Court has come no closer than *Sartori v. Harnischfeger Corp.*, 432 N.W.2d 448 (Minn. 1988).

Unfortunately, *Sartori* is not helpful. *Sartori* involved a real estate statute of repose and involved a Plaintiff who had other remedies available to him through workers compensation and/or claims based upon the negligent maintenance of the crane. In the case at bar, application of Nebraska law to this cause of action would leave Plaintiff with absolutely no remedy for the wrongs received. Application of Nebraska law to this Minnesota lawsuit would be a complete denial of Appellant's right to justice. This state constitutional question is one of first impression and should be referred to the Minnesota Supreme Court.

Appendix D

CONCLUSION

Certification will not create unnecessary delay of this matter. This case has neither been briefed nor argued. Appellant's brief is not due until May 31. No significant delay would result. Any inconvenience caused by a minor delay is outweighed by concerns for comity and the possibility that a Minnesota state court would later resolve the same question in a contrary manner, causing unnecessary disparity in the administration of Minnesota law. The application of another state's statute of repose is a general question that is likely to recur before the courts of Minnesota. Examples are found in the *Mahne* and *Farrell* dichotomy and the Beard decision. Ultimate statutes of repose exist in four other states. (Ex. 34) It is highly likely that one of these statutes will be presented to a Minnesota state court and the question will recur.

PROPOSED CERTIFIED QUESTIONS

Based upon the foregoing Statement of Facts, Appellant moves the Court to certify the following questions of law to the Supreme Court of Minnesota pursuant to Minn. Stat. § 480.061 (1992):

1. Is an ultimate statute of repose such as Neb. Rev. Stat. § 25-224(2) a procedural law which requires application of *lex fori*, the law of the forum, or a substantive law and in conflict with Minnesota law which then requires application of the Leflar choice - influencing considerations;

2. If the answer to the foregoing question is that an ultimate products liability statute of repose is substantive:

Appendix D

a) Does Minnesota have any governmental interest to be advanced by applying Nebraska's Statute of Repose so as to bar a cause of action brought by a Minnesota resident and citizen; and

b) Is an ultimate statute of repose such as Neb. Rev. Stat. § 25-224(2) a better law than Minnesota's absence of a products liability statute of repose.

3. Do the facts presented establish that Appellant is a forum shopper under Minnesota choice of law rules and, if so, what ramifications arise from that characterization; and

4. If the answer to the foregoing questions result in a tentative choice of Nebraska law, does application of Nebraska law to a cause of action owed by a Minnesota citizen violate the remedy clause of the Minnesota Bill of Rights (M.S.A. Const. Art. 1, § 8).

JILL NESLADEK, as Trustee for the
Heirs and Next of Kin of
Jeremy J. Nesladek, Defendant

By: s/ Eric W. Kruger
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was mailed to Appellee's attorneys of record by placing same in the United States Mail, postage prepaid, duly addressed to their business address on the 18th day of May, 1994.

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APPENDIX E — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, FIFTH DIVISION FILED MARCH 8, 1994

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION

Civil No. 5-93-106

JILL NESLADEK, as Trustee for the Heirs and Next of Kin of Jeremy J. Nesladek, Decedent,

Plaintiff

v.

FORD MOTOR COMPANY,

Defendant.

MEMORANDUM OPINION AND ORDER

William H. McDonald and William R. Robb, Woolsey, Fisher, Whiteaker & McDonald, Springfield, MO; Eric W. Kruger, Omaha, NE; and Steven W. Schneider, Halverson, Watters, By, Downs, Reyvelts & Bateman, Duluth, MN for plaintiff.

Hildy Bowbeer and Courtney G. Sylvester, Bowman and Brooke, Minneapolis, MN and Douglas Laird, Polsinelli, White, Vardeman, & Shalton, Kansas City, MO for defendant.

Appendix E

INTRODUCTION

Before the Court are three motions:[1] plaintiff Jill Nesladek's motion to certify a question of law to the Minnesota Supreme Court; defendant Ford Motor Company's ("Ford") motion to transfer venue; and Ford's motion for summary judgment. Plaintiff's motion for certification will be denied; defendant's motion for summary judgment will be granted, and defendant's motion to transfer venue will be denied as moot.

BACKGROUND

Jill Nesladek brought this action on behalf of her decedent, Jeremy J. Nesladek, who died from injuries suffered in an accident that occurred near West Point, Nebraska. On April 18, 1990, plaintiff's husband, Ken Nesladek, prepared to take his two sons to daycare. Mr. Nesladek placed one of his sons in his Ford pickup truck and noticed that his other son, Jeremy, had pulled his toy wagon behind the truck. Mr. Nesladek left the cab of the truck to move the toy. Before Mr. Nesladek had returned to the cab, the truck rolled backward over Jeremy. Jeremy died from his injuries on February 20, 1992.

Nesladek claims that the truck "jumped" from park to reverse due to defects in certain components of the steering column. The vehicle at issue is a composite of two Ford trucks, one a 1973 model and the other a 1976 model. In 1989, Mr. Nesladek, with the assistance of Gerald Kreikemeier, replaced

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1. The motions were argued by counsel on December 10, 1993. Shortly thereafter, the Court was advised that the parties were engaged in settlement discussions and the Court was requested to defer a ruling on the then pending motions. On February 28, 1994, the Court was advised that such discussions had not been successful.

the cab portion of the 1973 truck with the cab from the 1976 truck.[2] The parties dispute from which truck the allegedly defective components originated. Nesladek claims that the relevant components were part of the 1976 truck, manufactured and assembled in Minnesota. Ford counters that the steering column components in the modified vehicle were taken from the 1973 truck, manufactured in Michigan. Alternatively, Ford responds that the steering column components from the 1976 truck, even if implicated in the accident, were manufactured and assembled into one unit in Indiana and installed as a unit into the 1976 truck in Minnesota.

At the time of the accident, plaintiff, her husband and her decedent resided in Nebraska. Following the decedent's death, Nesladek moved to Minnesota and thereafter commenced this action. In her complaint, Nesladek alleges the following claims: 1) breach of warranty; 2) strict liability; 3) failure to warn; 4) breach of duty to recall; and 5) negligence. Ford moves for summary judgment on the grounds that Nesladek's action is time-barred under Nebraska's statute of repose for products liability actions. Ford also moves to transfer venue to the United States District Court for the District of Nebraska under 28 U.S.C. § 1404(a). Nesladek moves to certify to the Minnesota Supreme Court the question of whether the Nebraska statute of repose is a procedural or substantive rule of law.

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2. Ford contends that an improper adjustment by Mr. Kreikemeier, rather than a design defect, caused the accident.

Appendix E

DISCUSSION

I. PLAINTIFF'S MOTION FOR CERTIFICATION OF A LEGAL QUESTION TO THE MINNESOTA SUPREME COURT.

Nesladek moves, pursuant to Minn. Stat. § 480.061 (1992), to certify to the Minnesota Supreme Court the issue of whether Nebraska's products liability statute of repose is substantive or procedural for choice of law purposes. The Nebraska statute states:

> Notwithstanding subsection (1) of this section or any other statutory provision to the contrary, any product liability action, except one governed by section 2-725, Uniform Commercial Code or by subsection (5) of this section [dealing with asbestos claims], shall be commenced within ten years after the date when the product which allegedly caused the personal injury, death, or damage was first sold or leased for use or consumption.

Neb. Rev. Stat. § 25-224(2).[3]

Because both of the Ford trucks forming the vehicle at issue were sold more than ten years before Neslade commenced this action, application of this statute would bar Nesladek's claim.[4]

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3. The parties do not dispute that this case is a products liability action subject to this statute should the Court determine that Nebraska law governs.

4. Regardless of which date of sale — 1973 or 1976 — triggers the statute, the limitations period expired at the latest in 1986.

Minnesota has no similar statute. Nesladek argues that because Minnesota courts have not previously characterized a statute of repose, no precedent exists to guide this Court's analysis, rendering certification to the supreme court appropriate.

A federal district court sitting in diversity must apply the rules of state law which it believes the state's own courts would apply. *Independent School Dist. No. 197 v. W.R. Grace & Co.*, 752 F. Supp. 286, 298 (D. Minn. 1990). A federal district court may certify to the state's supreme court those questions of law which appear determinative of the pending cause of action and relating to which no controlling precedent exists to guide the district court. *Id.* A federal court shall not, however, invoke certification to avoid resolving the issues before it, "[a]bsent a close question and lack of state sources enabling a nonconjectural determination." *Shakopee Mdewakanton Sioux v. City of Prior Lake*, 771 F.2d 1153, 1157 n.2 (8th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986).

Although the Minnesota Supreme Court has not expressly characterized a products liability statute of repose, it has identified principles by which to distinguish between procedural rules and substantive rights. Procedural rules affect a plaintiff's remedy, or the ability to enforce existing rights and obtain redress for their invasion. *Stern v. Dill*, 442 N.W.2d 322, 324 (Minn. 1989). Substantive law, in contrast, "creates, defines and regulates rights." *Id.* The basic tenants of Minnesota law provide a framework within which this Court can sufficiently analyze Nebraska's statute of repose. The Court also may look for guidance to Nebraska's characterization of its own statute. *Anderson v. State Farm Mut. Auto. Ins. Co.*, 24 N.W. 2d 836, 839 (Minn. 1946); *Mason v. Spiegel, Inc.*, 610 F. Supp. 401, 404 n.2 (D. Minn. 1985). To certify the question would unnecessarily

consume resources and delay this matter. Therefore, Nesladek's motion for certification of a legal question will be denied.

II. DEFENDANTS MOTION FOR SUMMARY JUDGMENT

Ford moves for summary judgment on the grounds that Nebraska's products liability statute of repose bars plaintiff's actio

uant to Fed. R. Civ. P. 56(c), a district court may grant sum a judgment if the evidence shows that "there is no genu sue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The moving party bears the initial burden of establishing the non-existence of a genuine issue of material fact. *Id.* at 323; *City of Mr. Pleasant, Iowa v. Assoc. Elec. Co-op.*, 838 F.2d 268, 273 (8th cir. 1988). Once it meets that burden, the nonmoving party may not then "rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

Ford contends that Nebraska's statute of repose is a substantive rule of law which governs this matter under Minnesota's choice of law principles. The Nebraska statute bars a products liability action commenced more than ten years after the product which allegedly caused the injury was first sold or leased for use or consumption. Neb. Rev. Stat. § 25-244(2). If applicable, this statute would bar the instant action as a matter of law and summary judgment for Ford would be appropriate.

Under Minnesota choice of law analysis the Court initially must determine whether a conflict exists, or in other words,

whether the choice of one law over the other will determine the outcome. *Myers v. Gov't. Employees Ins. Co.*, 225 N.W.2d 238, 241 (Minn. 1974). Because Nebraska law would bar this action and Minnesota law would not, a conflict exists. *See Kearns v. Am. Family Ins. Group*, 486 N.W.2d 796, 798 (Minn. Ct. App. 1992).

Next, the Court must characterize Nebraska's statute of repose as either a substantive or procedural rule of law. If procedural, the law of the forum, or Minnesota law, applies. *Davis v. Furlong*, 328 N.W.2d 150, 153 (Minn. 1983). If the statute is substantive, however, the Court must engage in further choice of law analysis to determine which state's substantive law governs this action.

As stated above, Minnesota courts define substantive law as that which "creates, defines and regulates rights." *Stern*, 442 N.W.2d at 324, (quoting *Meagher v. Kavli*, 88 N.W.2d 871, 879-80 (Minn. 1958)). Procedural law, in contrast, regulates a plaintiff's remedy by prescribing the method of enforcing rights or obtaining redress for a violation of those rights. *Id.* Procedural rules affect the parties' relationship as litigants, not as it relates to the underlying matter in dispute. *Zaretsky v. Molecular Biosystems, Inc.*, 464 N.W.2d 546, 550 (Minn. Ct. App. 1990).

Nesladek equates the statute of repose to a statute of limitations, arguing that both relate equally to the time within which a plaintiff may commence a cause of action. Minnesota characterizes statutes of limitations as procedural, affecting only a plaintiff's remedy. *In re Daniel's Estate*, 294 N.W. 465, 469 (Minn. 1940); *U.S. Leasing v. Biba Info. Processing Serv., Inc.*, 436N.W.2d 823, 825 (Minn. Ct. App. 1989). No Minnesota court has expressly characterized a statute of repose.

Appendix E

In addition to heeding the principles of Minnesota law regarding procedure and substance, the Court may look for guidance to Nebraska's characterization of its own statute. *Anderson,* 24 N.W. 2d at 839; *Mason,* 610 F. Supp. at 404 n.2. Despite Nesladek's efforts to differently interpret Nebraska law, the Court finds that Nebraska courts characterize their products liability statute of repose as substantive. In *Givens v. Anchor Packing Inc.,* 466 N.W.2d 771, 773-74 (Neb. 1991), for example, the Nebraska Supreme Court stated:

> The immunity afforded by a statute of repose is a right which is as valuable to a defendant as the right to recover on a judgment is to a plaintiff; the two are but different sides of the same coin. Just as a judgment is a vested right which cannot be impaired by a subsequent legislative act . . . so too is immunity granted by a completed statutory bar . . . . These are substantive rights recognized by Nebraska law and protected by its constitution.

Nebraska courts repeatedly have recognized that unlike a statute of limitations, which precludes a party from suing on an existing claim, a statute of repose prevents the right of action from ever accruing. *See e.g., Gillam v. Firestone Tire Rubber Co.*, 489 N.W.2d 289, 291 (Neb. 1992); *Spilker v. City of Lincoln*, 469 N.W.2d 546, 548 (Neb. 1991). *See also Peterson v. Fuller Co.*, 807 F.2d 151, 152-53 (8th Cir. 1986) ("when the 'injury [occurs] outside of the ten-year period, no substantive cause of action . . . ever exist[s]' ") (citations omitted).

Nebraska's characterization of its statute is consistent with the principles set forth in Minnesota law. A statute of limitations

provides a time period after the injury occurs within which the plaintiff may commence a cause of action. By penalizing a plaintiff for the delay in asserting his rights, the limitations period affects the plaintiff's remedy, rather than the underlying right. Thus, a statute of limitations is properly characterized as procedural.

In contrast, the limitations period in the statute of repose begins to run when the product is sold, rather than when the injury occurs. The statute focuses on the age of the product rather than on the plaintiff's timeliness in commencing the action. The limitations period may even expire, as in this case, before the injury occurs. Because it bars not only the remedy, but also the underlying cause of action itself, the statute of repose creates, defines and regulates a plaintiff's rights. *See Stern*, 442 N.W.2d at 324. Therefore, the Court holds that the Nebraska products liability statute of repose is a substantive rule of law.

Because the Nebraska statute is substantive rather than procedural, the Court must proceed under Minnesota choice of law analysis to decide whether Nebraska or Minnesota substantive law applies to this case. Before reaching Minnesota's five choice-influencing factors, the Court must determine whether the application of either state's law would violate due process. *Hime v. State Farm Fire and Cas. Co.*, 284 N.W.2d 829, 832 (Minn. 1979), *cert. denied*, 444 U.S. 1032 (1980).

Due process requires that the state applying its substantive law "have significant contact or a significant aggregation of contacts, creating state interests, such that the choice of law is neither arbitrary or fundamentally unfair." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981); *Lindquist v. State Farm Mut. Auto. Ins.*, 415 N.W.2d 28, 31 (Minn. Ct. App. 1987). These

contacts must not be slight or casual. *Hime*, 284 N.W.2d at 832.

Nebraska has several significant contacts to this action. First, the accident occurred in Nebraska. At the time of the accident plaintiff, her decedent and her husband all resided in Nebraska. Except for a period where the decedent received care at a rehabilitation center in Texas, the decedent received all medical treatment for his injuries in Nebraska. Additionally, Nesladek and her husband were employed in Nebraska at the time of the accident. The vehicle involved in the accident was purchased, garaged, maintained and insured in Nebraska. Mr. Nesladek and Gerald Kreikemeier, also a Nebraska resident, modified the vehicle in Nebraska. Finally, Ford does business in Nebraska. The Court finds these contacts sufficient to render application of Nebraska law consistent with due process.

Minnesota, in contrast, has only three contacts with the parties and this occurrence.[5] First, the allegedly defective steering column components of the 1976 Ford truck were installed and introduced into the stream of commerce in Minnesota.[6]

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5. Nesladek lists nine Minnesota "contacts" with this action. Plaintiff's Memorandum in Opposition to Ford Motor Company's Motion for Summary Judgment ("Plaintiff's Brief") at 23-24. Only three, however, constitute factual contacts with the parties and with the occurrence giving rise to this litigation. *See Allstate*, 449 U.S. at 308.

6. Ford disputes Nesladek's claim that the allegedly defectivecomponents were taken from the 1976 Ford truck. For the purposes of this motion only, the Court will assume that the 1976 components are implicated in this action and that those components were "introduced into the stream of commerce on November 4, 1975, from Ford's St. Paul, Minnesota, facility." Plaintiff's Brief at 23.

Second, Ford does business in Minnesota. Third, after Nesladek's decedent's death and prior to commencing this action, Nesladek established residence in Minnesota and now acts as Minnesota court-appointed trustee for the probate estate of the decedent.

In *Allstate v. Hague*, the United States Supreme Court addressed the constitutional sufficiency of similar contacts. There, the victim was employed in Minnesota and commuted to Minnesota daily, the defendant did business in Minnesota and the plaintiff became a Minnesota resident prior to the institution of the action. *Allstate*, 449 U.S. at 313-19. The Supreme Court held these contacts sufficient in the aggregate to satisfy due process. *Id.* at 320.

The instant case presents a weaker connection to Minnesota, as Nesladek and her decedent neither resided nor worked in Minnesota at the time of the accident. Moreover, Minnesota's connection to the vehicle at issue is tenuous. By doing business in Minnesota, however, Ford had notice of potential lawsuits brought under forum law and cannot claim unfair surprise. Evaluating these contacts in the aggregate, the Court is not prepared to hold the application of Minnesota law to this case so arbitrary and fundamentally unfair as to violate due process.

After concluding that both states' contacts satisfy due process, the Court must apply the Milkovich choice-influencing considerations: (1) predictability, (2) maintenance of interstate order, (3) simplification of the judicial task, (4) advancement of governmental interests, and (5) application of the better rule of law. *Milkovich v. Saari*, 203 N.W.2d 408, 412 (Minn. 1973).

Predictability typically relates to consensual transactions

and, thus, is not a relevant consideration in a tort case. *Id.* The second factor, maintenance of interstate order, requires that the state whose laws are applied have sufficient connection with the facts in issue. *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43, 48 (Minn. 1979), *aff'd*, 449 U.S. 302 (1981). Although this factor often merges with the threshold due process issue, the maintenance of interstate order requires more than constitutional sufficiency; it directs a court to "apply the law of no state which does not have substantial connection with the total facts and the particular issue being litigated." *Milkovich*, 203 N.W.2d at 412. *See also Schwartz v. Consolidated Freightways Corp. of Del.*, 221 N.W.2d 665, 668 (Minn. 1974) (court may apply choice of law factors after "the rather minimal due process standards" have been satisfied). Additionally, under tis factor a court may consider other issues, such as forum shopping. *Hague*, 289 N.W.2d at 49. Because Minnesota's contacts with this case are not substantial, this factor warrants strong consideration. *Id.*

As noted above, the link between Minnesota and the conglomerated vehicle at issue is tenuous. Even assuming the allegedly defective components originated from the 1976 truck, Ford has produced evidence showing that the steering column assembly of the 1976 pickup was manufactured in Indiana and shipped as an assembled unit to Minnesota. Second Affidavit of Joseph M. Wills. Nesladek presents no contradictory evidence on that point.[7] At most, therefore, the transmission components of the 1976 vehicle were installed and introduced into commerce in Minnesota.

Moreover, while Ford's business presence in Minnesota may

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7. Nesladek appears to concede that the steering column components were installed, but not manufactured, in Minnesota. *See* Plaintiff's Brief at 23, 31.

render application of Minnesota law neither arbitrary nor fundamentally unfair, as Ford conducts business in all fifty states, this factor should not be given great significance in the choice of law analysis. *Rush v. Savchuk*, 444 U.S. 320, 330 (1980).

Finally, although a post-occurrence change of residence qualifies as a relevant contact in the due process analysis, *see Allstate*, 449 U.S. at 319, forum shopping becomes a strong consideration under the maintenance of interstate order factor if any evidence indicates that the plaintiff relocated for the purpose of bringing suit. *Hague*, 289 N.W.2d at 49. The interest in preventing forum shopping increases where a state's contacts are minimal. *Stenzel v. State Farm Mut. Auto. Ins. Co.*, 379 N.W.2d 674, 676 (Minn. Ct. App. 1986).

Here, plaintiff's husband acknowledged that the ability to bring suit under Minnesota law constituted a primary consideration in the family's relocation to Minnesota.

> Q: . . . But I am asking you, when you evaluate sitting here today the reasons that you moved to Minnesota, where or how important was the fact that you wanted to take advantage of Minnesota law?
>
> * * *
>
> A: It's probably equal.
>
> Q: The two things you identified as the reason: Are there two things we are talking about? One was the fact that you wanted to take advantage of Minnesota law and the second one was the

availability for Jill's education?

* * *

A: Well, everything, I would say, was equal. The first was with the law and with her going to college and just to move from the scene of where Jeremy was hurt on our place....

Defendant's Exhibit A at 134-45 (objections omitted). Because Minnesota has a minimal connection to the facts of this action and because application of Minnesota law would facilitate blatant forum shopping, the maintenance of interstate order factor strongly favors the application of Nebraska law.

The third *Milkovich* factor is the simplification of the judicial task. Because Minnesota courts are fully qualified to apply the laws of another forum, this consideration is irrelevant to the analysis. *Hague*, 229 N.W.2d at 49.

Fourth, the Court must consider the forum's governmental interest. This factor ensures that a court will not enforce rules contrary to its own policies and sense of justice. *Milkovich*, 203 N.W.2d at 414. Minnesota has an interest in fully compensating tort victims. *Hague*, 229 N.W.2d at 49. This interest, however, pertains to those victims injured and treated within Minnesota borders. *Hime*, 284 N.W.2d at 833. Full recovery enables those injured and receiving medical care in the state to meet financial obligations without state assistance, thus offsetting the economic burden on the state. *Hague*, 229 N.W.2d at 49; *DeRemer v. Pacific Intermountain Exp. Co.*, 353 N.W.2d 694, 698 (Minn. Ct. App. 1984). Here, plaintiff's decedent was neither injured nor treated in Minnesota. Thus, unlike Nebraska, where decedent received

substantial medical care, Minnesota lacks any significant economic interest in this case.

Under this factor, the Court must also evaluate Nebraska's interest in the application of its laws. *Myers*, 225 N.W.2d at 242. The products liability statute of repose reflects Nebraska's interest in limiting the liability of manufacturers for aging products.[8] The Nebraska Supreme Court has upheld Nebraska's ten-year limitation on products liability actions as neither arbitrary nor unfair. *Spilker*, 469 N.W.2d at 548. Permitting a plaintiff to circumvent Nebraska law and maintain a claim in a state lacking significant contacts with the action would thwart Nebraska's interest in applying its laws.

Nesladek asserts that the policies underlying the Nebraska repose statute conflict with Minnesota policy, as reflected by Minnesota's enactment of a useful life statute. Under Minnesota law:

> [i]n any action for the recovery of damages for personal injury, death or property damage arising out of the manufacture, sale, use or consumption of a product, it is a defense to a claim against a designer, manufacturer, distributor or seller of the product or a part thereof, that the injury was sustained following the expiration of the ordinary useful life of the product.

Minn. Stat. § 604.03 subd. 1 (1993). The Minnesota Supreme Court has described the useful life statute as a type of repose

8. This policy is particularly applicable to this case, involving a seventeen year-old and substantially modified vehicle.

statute under which the jury determines the limitations period rather than the legislature. *Hodder v. Goodyear Tire and Rubber Co.*, 426 N.W.2d 826, 830 (Minn. 1988), *cert. denied*, 492 U.S. 926 (1989). Regarding this statute the Hodder court stated: "[t]he legislature was concerned about expanding products liability and intended to limit the open-ended liability for aging products." *Id.*

The Minnesota useful life statute advances the same policy as Nebraska's statute of repose, albeit through a less rigid mechanism. Despite the arguments for and against measuring the limitations period by a "useful life" concept or by a fixed number of years, each statute serves to limit the liability of manufacturers. Thus, Nebraska law does not run afoul of Minnesota's concepts of fairness and equity. Because the action implicates a clear Nebraska interest not in conflict with Minnesota policy and because Minnesota lacks any significant interest in this action, the state interest factor strongly favors application of Nebraska law.

The final choice-influencing consideration is the application of the better rule of law. A court need not reach this consideration if the preceding four factors clearly dictate the application of one state's law. *Myers*, 225 N.W.2d at 244; *Hime*, 284 N.W.2d at 83. The Court concludes that the preceding factors mandate the application of Nebraska law; thus, the Court does not address this factor.

Based on the foregoing, the Court holds that Nebraska's statute of repose, Neb. Rev. Stat. section 25-224(2), is a substantive rule of law. Under Minnesota choice of law analysis, the Court will apply Nebraska law to this case; this cause of action is therefore barred by Nebraska's ten year limitations period for products liability claims.

Appendix E

III. DEFENDANT'S MOTION TO TRANSFER VENUE

Ford moves this Court to transfer venue to the United States District Court for the District of Nebraska. Because the Court has granted summary judgment in Ford's favor, this motion will be denied as moot.

CONCLUSION

Based on the files, records, and proceedings herein, including the briefs and arguments of counsel, **IT IS HEREBY ORDERED** that:

1. Nesladek's motion for certification to the supreme court is **DENIED**;

2. Ford's motion for summary judgment is **GRANTED** and plaintiff's complaint is **DISMISSED** with prejudice; and

3. Ford's motion to transfer venue is **DENIED AS MOOT.**

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: March 7, 1994.

s/ Richard H. Kyle
RICHARD H. KYLE, Judge
United States District Court

APPENDIX F — MINN. STAT. § 480.061 (1992)

480.061 SUPREME COURT

CERTIFICATION OF QUESTIONS OF LAW

480.061 UNIFORM CERTIFICATION OF QUESTIONS OF LAW.

Subdivision 1. Power to answer. The supreme court may answer questions of law certified to it by the supreme court of the United States, a court of appeals of the United States, a United States district court, a United States bankruptcy court, or the highest appellate court or the intermediate appellate court of any other state, when requested by the certifying court if there are involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the supreme court of this state.

Subd. 2. Method of invoking. This section may be invoked by an order of any of the courts referred to in subdivision 1 upon the court's own motion or upon the motion of any party to the cause.

Subd. 3. Contents of certification order. A certification order shall set forth

(a) the questions of law to be answered; and

(b) a statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose.

Appendix F

Subd. 4 Preparation of certification order. The certification order shall be prepared by the certifying court, signed by the judge presiding at the hearing, and forwarded to the supreme court by the court administrator of the certifying court under its official seal. The supreme court may require the original or copies of all or of any portion of the record before the certifying court to be filed with the certification order, if, in the opinion of the supreme court, the record or portion thereof may be necessary in answering the questions.

Subd. 5. Costs of certification. Fees and costs shall be the same as in civil appeals docketed before the supreme court and shall be equally divided between the parties unless otherwise ordered by the certifying court in its order of certification.

Subd. 6. Briefs and argument. Proceedings in the supreme court shall be those provided in rules of the court.

Subd. 7. Opinion. The written opinion of the supreme court stating the law governing the questions certified shall be sent by the clerk of the court to the certifying court and to the parties and shall be res judicata as to the parties.

Subd. 8. Power to certify. The supreme court or the court of appeals, on its own motion or the motion of any party, may order certification of questions of law to the highest court of any state when it appears to the certifying court that there are involved in any proceeding before the court questions of law of the receiving state which may be determinative of the cause then pending in the certifying court and it appears to the certifying court that there are no controlling precedents in the decisions of the highest court or intermediate appellate courts of the receiving state.

Sub. 9. Procedure on certifying. The procedures for certification from this state to the receiving state shall be those provided in the laws of the receiving state.

Sub. 10. Uniformity of application and construction. This section shall be so applied and construed as to effectuate its general purpose to make uniform the law with respect to the subject of this section among those states which enact it.

Subd. 11. Citation. This section may be cited as the uniform certification of questions of law act.

History: 1973 c 25 s 1; 1983 c 247 s 164;; 1Sp1986 c 3 art 1 s 82; 1988 c 484 s 1

APPENDIX G — MINN. STAT. § 604.03

MINNESOTA STATUTES ANNOTATED
JUDICIAL PROOF
CHAPTER 604. ACTIONS INVOLVING FAULT
COPR. (c) WEST 1994 No Claim to Orig. U.S. Govt. Works
Current through Laws 1993, 1st Spec. Sess., Chapter 6, approved 5-27-93

604.03. Useful life of product

Subdivision 1. In any action for the recovery of damages for personal injury, death or property damage arising out of the manufacture, sale, use or consumption of a product, it is a defense to a claim against a designer, manufacturer, distributor or seller of the product or a part thereof, that the injury was sustained following the expiration of the ordinary useful life of the product.

Subd. 2. The useful life of a product is not necessarily the life inherent in the product, but is the period during which with reasonable safety the product should be useful to the user. This period shall be determined by reference to the experience of users of similar products, taking into account present conditions and past developments, including but not limited to (1) wear and tear or deterioration from natural causes, (2) the progress of the art, economic changes, inventions and developments within the industry, (3) the climatic and other local conditions peculiar to the user, (4) the policy of the user and similar users as to repairs, renewals and replacements, (5) the useful life as stated by the designer, manufacturer, distributor, or seller of the product in brochures or pamphlets furnished with the product or in a notice attached to the product, and (6) any modification of the product by the user.

Appendix G

1988 Main Volume Credit(s)

Laws 1978, c. 738, s 9, eff. April 15, 1978.

HISTORICAL NOTES

HISTORICAL AND STATUTORY NOTES

1988 Main Volume Historical and Statutory Notes

Laws 1978, c. 738, s 11, provides that this section is effective April 15, 1978, and applies to all causes of action arising on or after that date.

M. S. A. s 604.03
MN ST s 604.03
END OF DOCUMENT

APPENDIX H — NEB. REV. STAT. § 25-224(2)

Neb. Rev. Stat. § 25-224. Actions on product liability. (1) All product liability actions, except one governed by subsection (5) of this section, shall be commenced within four years next after the date on which the death, injury, or damage complained of occurs.

(2) Notwithstanding subsection (1) of this section or any other statutory provision to the contrary, any product liability action, except one governed by section 2-725, Uniform Commercial Code or by subsection (5) of this section, shall be commenced within ten years after the date when the product which allegedly caused the personal injury, death, or damage was first sold or leased for use or consumption.

(3) The limitations contained in subsection (1), (2), or (5) of this section shall not be applicable to indemnity or contribution actions brought by a manufacturer or seller of a product against a person who is or may be liable to such manufacturer or seller for all or any portion of any judgment rendered against a manufacturer or seller.

(4) Notwithstanding the provisions of subsections (1) and (2) of this section, any cause of action or claim which any person may have on July 22, 1978, may be brought not later than two years following such date.

(5) Any action to recover damages based on injury allegedly resulting from exposure to asbestos composed of chrysotile, amosite, crocidolite, tremolite, anthrophyllite, actinolite, or any combination thereof, shall be commenced within four years after the injured person has been informed of discovery of the injury by competent medical authority and that such injury was caused by exposure to asbestos as described herein, or within four years

after the discovery of facts which would reasonably lead to such discovery, whichever is earlier. No action commenced under this subsection based on the doctrine of strict liability in tort shall be commenced or maintained against any seller of a product which is alleged to contain or possess a defective condition unreasonably dangerous to the buyer, user or consumer unless such seller is also the manufacturer of such product or the manufacturer of the part thereof claimed to be defective. Nothing in this subsection shall be construed to permit an action to be brought based on an injury described in this subsection discovered more than two years prior to August 30, 1981.

Source: Laws 1978, LB 665, § 2; Laws 1981, LB 29, § 1.

APPENDIX I — STATE SURVEY (EXHIBIT 34 IN DISTRICT COURT)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Case No. 5-93-106

JILL NESLADEK, as Trustee for the Heirs and Next of Kin of Jeremy J. Nesladek, Decedent,

Plaintiff,

vs.

FORD MOTOR COMPANY,

Defendant.

AFFIDAVIT OF ERIC KRUGER
RE: STATE SURVEY

STATE OF NEBRASKA)
) ss
COUNTY OF DOUGLAS)

1. I am one of Plaintiff's attorneys in this matter;

2. 1 am admitted to the Nebraska State Courts, Nebraska District Courts and Eighth Circuit Courts and have been admitted *pro hac vice* to this Court;

3. I recently went to the Creighton University Law Library and conducted a survey of all 50 state laws relative to the various approaches to products liability statutes of repose. The findings

verified the insurance industry's comments that each state should be used as a laboratory for experimentation. (see Better Law section of Plaintiff's Brief);

4. In many instances, I then picked up the phone and verified the results of my research and characterization with trial attorneys around the country;

5. In my opinion, the following states do not have a products liability statute of repose:

Alabama	Alaska	Arkansas
California	Delaware	Florida
Hawaii	Iowa	Kentucky
Louisiana	Maine	Maryland
Massachusetts	Michigan	Minnesota
Mississippi	Missouri	Montana
Nevada	New Hampshire	New Jersey
New Mexico	New York	North Dakota
Ohio	Oklahoma	Pennsylvania
Rhode Island	South Carolina	South Dakota
Texas	Utah	Vermont
Virginia	West Virginia	Wisconsin
Wyoming		

Characterizing Michigan's statute as a statute of repose is not accurate. (M.C.A. § 27A-6305(9)) simply eliminates a presumption and appears to be nothing more than an alternative evidence rule. Texas just enacted a law which could be called a statute of repose, however, it only applies to industrial equipment, not consumer products as involved in the case at bar. Thus, while my opinion may be subject to cross examination, I am comfortable in characterizing the laws of Michigan and Texas as being in the non-statute of repose category;

Appendix I

6. In my opinion, the following states have a useful safe life/ rebuttable presumption for of a statute of repose which, to varying degrees, are similar and/or based upon the Uniform Model Products Liability Act's approach to manufacturers liability for older products:

ARIZONA	§ 12-551. After twelve years, a manufacturer is immune from strict liability claims and claims of implied warranties, however, no immunity is granted for claims that the manufacturer negligently designed or manufactured a product.
COLORADO	§ 13-80-107. Applies only to manufacturing equipment and does not include misrepresentation, fraudulent concealment, nor warranty claims.
CONNECTICUT	§ 52-577(a). Does not apply to a claimant who can prove that the harm occurred during the useful safe life of the product.
GEORGIA	§ 51-1-11 . Is not applicable to: a) negligence in manufacturing products which cause a disease; b) negligence in manufacturing product which causes a birth defect; and

c) conduct which manifests a willful, reckless, or wanton disregard for life or property, nor does the statute of repose relieve a manufacturer from the duty to warn.

IDAHO	§ 6-1403. After 10 years, a presumption arises that the harm was caused after the useful life of the product had expired.
ILLINOIS	§ 13-213. Merely states that after a product has been in use for ten (10) years, the manufacturer may not be sued under the doctrine of strict liability. This statute does not abrogate a claimant's right to sue under negligence and warranty theories.
KANSAS	§ 60-3303 and 60-513. Manufacturer may prove by a preponderance of the evidence that the harm was caused after the product's "useful safe life" had expired. It is highly unlikely that the manufacturer would be able to make such a proof under the case at bar or even attempt such a feat.
WASHINGTON	§ 7.72.060. If harm was caused more than twelve (12) years after delivery of the product to its first purchaser, a manufacturer is untitled to a presumption that the harm was caused

after the useful safe life had expired. Manufacturers are not liable if the manufacturer proves by preponderance of evidence that the harm was caused after the product's useful life. Claimant is entitled to produce evidence.

7. In my opinion, the following states are the only jurisdictions which still have an ultimate products liability statute of repose, (the effective date of those statutes is also listed):

INDIANA §33-1-1.5-5, 33-1-1.5-6— 1978

NEBRASKA §25-224— 1978

NORTH CAROLINA §1-50(6) — 1979

OREGON §30.905 — 1977

TENNESSEE §29-28-103 — 1978

Oregon has made express provisions for the retroactive application of its exception from its statute of repose of those civil actions relating to intrauterine contraceptive devices. Oregon Laws 1989, Chapter 642-§4, appearing as a note to Oregon Revised Statutes 30.905.

Indiana's statute apparently does not apply to allegations relative to failure to warn nor to an allegation of a duty to recall.

8. Attached hereto and incorporated by this reference is a map of the United States wherein I have depicted, in blue, the

states with no statute of repose (see paragraph 8). Depicted in green are the states which have a useful life approach to a statute of repose. (see paragraph 9). The states which remain white, are states with an ultimate products liability statute of repose. My staff tells me that their review of the latest atlas in our office reveals that these states comprise less than 8% of the land mass of the United States and that less than 8.7% of our nation's population lives in these five states.

FURTHER, AFFIANT SAITH NOT.

DATED this 23rd day of November, 1993

s/ Eric W. Kruger
ERIC W. KRUGER

SUBSCRIBED TO AND SWORN to before me this 23rd day of November, 1 993.

s/ Bernadette K. Martin
Notary Public

[Map of the United States is not being printed at this time.]

APPENDIX J — AMERICAN JUDICATURE SOCIETY'S REPORT OF NOVEMBER, 1994

(Omitted here but submitted separately as Lodging Appendix.)